SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 641.

GABE E. PARKER, AS SUPERINTENDENT FOR THE FIVE CIVILIZED TRIBES, ET AL., APPELLANTS,

VS.

TOOTIE RILEY, A MINOR, BY U. C. STOCKTON, HER GUARDIAN, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May term, 1917, of said court, before the Honorable Walter H. Sanborn, circuit judge, and the Honorable Henry T. Reed and the Honorable Wilbur F. Booth, district judges.

Attest:

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the fourteenth day of July, A. D. 1915, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Gabe E. Parker, as superintendent for the Five Civilized Tribes, etc., et al., were appellants and Tootie Riley, a minor, etc., et al., were appellees, which said transcript as prepared, printed, and certified by the clerk of said District Court in pursuance of an act of Congress approved February 13, 1911, is in the words and figures following, to wit:

1 In the United States District Court, Eastern District of Oklahoma.

Pleas and proceedings before the Honorable Ralph E. Campbell, judge of the District Court of the United States for the Eastern District of Oklahoma, presiding in the following entitled cause:

TOOTIE RILEY, A MINOR, BY U. C. STOCKTON, HER guardian, and Thomas Riley, plaintiffs,
vs.
DANA H. KELSEY, AS UNITED STATES INDIAN SUPERintendent, Union Agency, W. M. Baker, General Disbursing Agent, Union Agency, Doc Willingham and Julia Willingham, a Minor, and Prairie Oil & Gas Company, a Corporation, defendants. } No. 2034. Equity.

GABE E. PARKER, AS SUPERINTENDENT FOR THE FIVE Civilized Tribes, Successor to Dana H. Kelsey, as United States Indian Superintendent, Union Agency, and W. M. Baker, as Cashier and Special Disbursing Agent for the Five Civilized Tribes, Successor to W. M. Baker, as General Disbursing Agent, Union Agency, appellants,
vs.
TOOTIE RILEY, A MINOR, BY U. C. STOCKTON, HER Guardian, Thomas Riley, Doc Willingham, Julia Willingham, a Minor, E. H. Walker, Her Guardian Ad Litem, and Prairie Oil and Gas Company, a Corporation, appellees.

2 In the District Court of the United States for the Eastern District of Oklahoma.—Tootie Riley, a minor, by U. C. Stockton, her guardian, and Thomas Riley, Plaintiffs, v. Dana H. Kelsey, as United States Indian Superintendent, Union Agency, W. M. Baker, General Disbursing Agent, Union Agency, Doc Willingham and Julia Willingham, a minor, and Prairie Oil & Gas Company, a corporation, defendants.

Complaint—In equity.

To the Honorable Judges of the District Court of the United States for the Eastern District of Oklahoma.

I. Tootie Riley, a minor, of Hanna, and a citizen of the State of Oklahoma, by U. C. Stockton, of Hanna, a citizen of the State of Oklahoma, her guardian, and Thomas Riley, of Hanna, and a citizen of the State of Oklahoma, bring this their bill against Dana H. Kelsey, as United States Indian Superintendent, Union Agency, a resident of Muskogee, and a citizen of the State of Oklahoma, and an officer of the Interior Department of the United States, and W. M. Baker, as general disbursing agent, Union Agency, Muskogee, and an officer of the Interior Department of the United States, and Doc Willingham, of Lenna, McIntosh County, and a citizen of the State of Oklahoma, and Prairie Oil & Gas Company, a corporation, created, organized, and existing under the laws of the State of Kansas, and a citizen thereof, and doing business in the State of Oklahoma. And thereupon your orators complain and say:

II. That one Emma Derrisaw, a full-blood citizen of the Creek Nation of the Five Civilized Tribes, in the Indian Territory, duly enrolled as such, died on or about the 17th day of November, 1907, seized in fee of the following described lands, to wit: The southwest quarter of the southeast quarter of section thirty-two, township eighteen north, range seven east, in the Creek Nation, Indian Territory, now in Creek County, State of Oklahoma, according to the United States Survey thereof, said lands being the homestead allotment of the said Emma Derrisaw, deceased, duly selected and patented to her according to the laws of the United States as a part of her proportionate share of the lands of the Creek Nation, Indian Territory.

3 That your orator, Thomas Riley, a full-blood citizen of the said Creek Nation, and the said Emma Derrisaw intermarried during the year 1900, according to the laws and customs of the Creek Nation, and the Common Law of England extended in force in said Nation, and that the said Thomas Riley and Emma Derrisaw lived together as husband and wife until early in the year 1905, when the said Emma Derrisaw deserted and abandoned the said Thomas Riley, her husband, without cause, and commenced an adulterous co-habitation with the defendenat, Doc Willingham, which continued until her death. That your orator, Tootie

Riley, was born during the year 1901, and is the lawful legitimate issue of the marriage of the said Thomas Riley and the said Emma Derrisaw, deceased. That the defendant, Julia Willingham, is the illegitimate issue of said adulterous cohabitation of the said Doc Willingham and the said Emma Derrisaw, and that the said Julia Willingham was born on the 10th day of February, 1906, and prior to the 4th day of March, 1906.

That at the time of the death of the said Emma Derrisaw the said homestead allotment above described had not been prospected for oil, gas, or any other minerals, and that no mines of oil or gas had been drilled or opened on the same.

That on or about the 3rd day of October, 1912, the said Thomas Riley, as guardian of said Tootie Riley, a minor, the said Thomas Riley in his own behalf, the said Doc Willingham, one James Price, claiming to act as the guardian of Tootie Riley, and Barney Derrisaw, as guardian of the said Julia Willingham, executed an oil and gas mining lease of said lands above described to one James A. Chapman, in accordance with the rules and regulations prescribed by the Secretary of the Interior of the United States; that said lease was thereafter approved by the said Secretary of the Interior, and was, on or about the 13th day of January, 1913, assigned by the said James A. Chapman, with the approval of the Secretary of the Interior, to the defendant, Prairie Oil & Gas Company.

That after the execution and approval of said lease as aforesaid oil mines or wells were drilled and opened on said lands so leased as aforesaid and oil discovered therein and produced therefrom in paying quantities and that the royalties accruing therefrom under the terms of said lease have been paid to the United States Indian Superintendent, Union Agency, at Muskogee, and that the said defendant, Dana H. Kelsey, as United States Indian Superin-
4 tendent, Union Agency, now has in his possession as royalties from the oil produced from said lands under the terms of said lease, the sum of fifteen thousand dollars.

That the said Tootie Riley and Thomas Riley, your orators herein, and Julia Willingham, one of the defendants herein, are the sole surviving heirs of the said Emma Derrisaw, deceased, and are entitled to an equal one-third part each of the said royalties in the hands of the said defendant, Dana H. Kelsey, and have demanded of the said Dana H. Kelsey, as United States Indian Superintendent and of the said W. M. Baker, as general disbursing agent, their said respective shares of said royalties, but the payment of the same has been refused, and the said Dana H. Kelsey and the said W. M. Baker are threatening and are about to pay the whole sum of said royalties in their hands as aforesaid to the defendant, Julia Willingham, to the manifest injury of these plaintiffs.

III. But now, so it is, may it please the court, that the said Dana H. Kelsey, as United States Indian Superintendent, W. M. Baker, as general disbursing agent, Doc Willingham, Julia Willingham,

and Prairie Oil & Gas Company, combining and confederating with divers persons at present to your orators unknown, whose names, when discovered, your orators pray they may insert herein with proper and apt words to charge them as parties defendant, and contriving how to injure and wrong your orators in the premises, they, the said defendants, absolutely refuse to comply with your orators' request and at times pretend that your orators are not entitled to any part of said royalties whatsoever.

IV. That the said defendants sometimes allege and pretend that the said Doc Willingham was the lawful surviving husband of the said Emma Derrisaw, deceased, and that the said Julia Willingham was born since March 4th, 1906, and that by reason of the provisions of section nine of the act of Congress approved May 27th, 1908, entitled An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes, your orators are entitled to no part of said royalties whatsover, and that the said Julia Willingham is entiled to the exclusive ownership, use, and enjoyment of said royalties, whereas your orators charge the contrary thereof to be the truth, and that the said Doc Willingham never was at any time the lawful husband of the said Emma Derrisaw, and that the said Julia Willingham was born prior to March 4th, 1906, and that if the said Julia Willingham were born subsequent to March 4th, 1906, which your orators deny, that she is entitled to the interest only on said royalties during her lifetime until March 4th, 1931, and that these orators are entitled to a one-third share of interest each in the principal sum of said royalties.

V. All which acts, doings, and pretenses of the defendant are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orators in the premises. In consideration whereof, and inasmuch as your orators are entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this kind are properly cognizable and relievable.

VIII. To the end, therefore, that the said Dana H. Kelsey, W. M. Baker, Doc Willingham, Julia Willingham, and Prairie Oil & Gas Company, and the rest of the confederates when discovered, may, without oath, their answer under oath being hereby expressly waived, may full, direct, and perfect answer make to all and singular the matters hereinbefore stated as fully and particularly as if the same were here again repeated, and they thereunto particularly interrogated.

And that the said defendants may be decreed to pay unto your orators an equal one-third part of the said royalties aforesaid now due or hereafter to be collected; and that they have relief upon the general facts alleged herein, although it may be discovered that the said Julia Willingham was born since March 4, 1906, for that in that event, by the proper construction of the said section nine of

said act of Congress of May 27, 1908, your orators are entitled to an equal one-third interest or share in the principal sum of said royalties subject only to the use thereof of the said Julia Willingham; that is to say, the interest thereon during her lifetime until March 4, 1931; that the defendants, Dana H. Kelsey and W. M. Baker, be enjoined from paying said royalties to the said defendant, Julia Willingham, and that your orators have such other and further relief in the premises as shall be agreeable to equity and good conscience.

May it please the court to grant unto your orators the writ of subpoena issuing out of and under the seal of this honorable court, to be directed to the said Dana H. Kelsey, as United States
6 Indian superintendent, Union Agency, W. M. Baker, as general disbursing agent, Union Agency, Doc Willingham, Julia Willingham, and Prairie Oil & Gas Company, therein and thereby commanding them on a certain day and under a certain penalty to be therein inserted that they and each of them be and appear before this honorable court, then and there to answer the premises and to stand to, abide, and perform such order and decree therein as to this court shall seem proper, and as shall be agreeable to equity and good conscience. And your orators will ever pray.

W. J. HORTON,
R. A. SMITH,
Of Counsel for Plaintiffs.

Horton & Smith, of McAlester, and Lafayette Walker, of Holdenville, solicitors for plaintiffs.

State of Oklahoma, County of Hughes, ss.

U. C. Stockton and Thomas Riley, being each first duly sworn, depose and say: That they are the plaintiffs herein; that they have read the foregoing complaint and know the contents thereof and the same is true to their own knowledge, except to the matters therein stated to be alleged on information and belief, and as to those matters they believe it to be true.

U. C. STOCKTON.
THOMAS RILEY.

Subscribed and sworn to before me this 7th day of March, 1914.

[SEAL.] JAMES W. HULS,
Notary Public, Hughes County, State of Oklahoma.

My commission expires Aug. 9, 1917.

(Endorsed:) Filed Mar. 12, 1914, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

And, to wit, on the 27th day of March, A. D. 1914, the defendants, Doc Willingham and Julia Willingham, a minor, by her guardian, E. H. Walker, filed their answer and cross complaint herein, and on the 14th day of July, A. D. 1914, the above answer was refiled and considered also as the answer of E. H. Walker, guardian ad litem

of Julia Willingham. Said answer and cross complaint are in words and figures as follows:

7 *Answer and cross complaint.*

Comes now Doc Willingham and Julia Willingham, a minor, by her duly qualified and acting guardian E. H. Walker (a copy of letters of guardianship being hereto attached and marked as Exhibit "A"), by their attorney, C. H. Tully, and for answer and cross complaint in equity in the above-styled cause of action, states:

I.

That respondents, Doc Willingham and Julia Willingham, admit all of paragraph 1 of said complaint.

II.

And admit that Emma Derrisaw was a full-blood citizen of the Creek Nation of the Five Civilized Tribes in the Indian Territory and was duly enrolled as such, but deny that she died on or about the 17th day of November, 1907, and alleges that she died on the 17th day of November, 1908, seized of the land as described in the petition.

III.

Respondents deny that Thomas Riley and Emma Derrisaw were married in the year 1900 according to the laws and customs of the Creek Nation and the common law of England extended and in force in said nation, and further deny that Emma Derrisaw deserted and abandoned the said Thomas Riley, but allege that at no time was Thomas Riley ever married to Emma Derrisaw according to any law and custom. And that the said Thomas Riley was never held out to the world by Emma Derrisaw as her legal or common-law husband. And that the said Emma Derrisaw did on and up to the time of her marriage to Doc Willingham bear the name of Emma Derrisaw, and at no time took the name of Emma Riley, and at no time occupied the home or received the support of Thomas Riley; but allege that the said Doc Willingham and Emma Derrisaw were married by W. P. Jones, a minister of the gospel, and were married at Lenna in what is now McIntosh County, State of Oklahoma, on the 30th day of June, 1905, according to the laws in vogue in the Indian Territory in the presence of witnesses.

IV.

Respondents deny that Tootie Riley is the lawful issue of the marriage of the said Thomas Riley and Emma Willing-
8 ham, nee Emma Derrisaw, deceased. And would further deny that Julia Willingham is the illegitimate issue of any adulter-

ous cohabitation upon the part of the said Doc Willingham and said Emma Derrisaw, but allege that Julia Willingham was born in legal wedlock between Doc Willingham and Emma Willingham, nee Derrisaw, and that she was born on the 11th day of February, 1907, and not born on the 10th day of February, 1906, as alleged in the petition.

V.

Respondents above named admit that at the time of the death of Emma Willingham, nee Derrisaw, the homestead allotment as described in the petition had not been prospected for oil, gas, or other minerals, and further admits that on the 3rd day of October, 1912, the said Thomas Riley, as the guardian of Tootie Riley, a minor, and in his own behalf, the said Doc Willingham and the said James Price acting as guardian of Tootie Riley and Barney Derrisaw acting as guardian of Julia Willingham executed an oil and gas mining lease on said lands described in the petition as follows, to wit:

The southwest quarter of the southeast quarter of section thirty-two (32) township eighteen (18) north, range seven (7) east in the Creek Nation, Indian Territory, now in Creek County, State of Oklahoma, to one J. A. Chapman according to the rules and regulations as prescribed by the Department of the Interior. That said lease was approved by the Department of the Interior, and that on the 13th day of January, 1913, the lease was assigned by J. A. Chapman, with the approval of the Department of the Interior, to the Prairie Oil and Gas Company.

VI.

Respondents above named admit that after the execution and approval of said lease as aforesaid oil wells were drilled and opened on said lands so leased as aforesaid and oil discovered therein and produced therefrom in paying quantities, and that the royalties accruing therefrom under the terms of said lease have been paid to Dana H. Kelsey as United States Indian superintendent, Union Agency, at Muskogee, and that the said defendant, Dana H. Kelsey, as United States Indian superintendent, Union Agency, now has in his possession as royalties from the oil produced from said lands under the terms of said lease the sum of fifteen thousand dollars.

9 VII.

Respondents admit that Tootie Riley and Julia Willingham are surviving heirs of the said Emma Willingham, nee Derrisaw, and further allege that Doc Willingham is one of the surviving heirs, and that the only living and surviving heirs of Emma Willingham, deceased, nee Emma Derrisaw, are Tootie Riley, Julia Willingham, and Doc Willingham and deny that Thomas Riley is an heir at law of the said Emma Willingham, nee Derrisaw, and further deny that he is entitled to a one-third part or any part of the royalties or any interest in the real estate described in the petition.

VIII.

Respondents deny that part of paragraph 3, in which it is alleged they are contriving now to injure and wrong your orators in the premises, and further deny that the orators are entitled to any part of said royalties whatsoever.

IX.

Respondents deny that part of paragraph 4 that defendants sometimes allege and pretend that Doc Willingham was the lawful and surviving husband of said Emma Derrisaw, deceased, and that the said Julia Willingham was born prior to March 4, 1906, but allege it to be a fact and no pretence that Doc Willingham is the lawful surviving husband of Emma Willingham, nee Derrisaw, deceased, and that Julia Willingham was born since March 4, 1906. And allege that by reason of the provision of section 9 of an act of Congress approved May 27, 1908, entitled "An act for the removal of restrictions from part of the lands of the Five Civilized Tribes and for other purposes," that by such act that Julia Willingham is entitled for her use and benefit all royalties, bonus, or other monies that have accrued upon the following described real estate, to wit:

The southwest quarter of the southeast quarter of section thirty-two (32), township eighteen (18) north, range seven (7) east, the same being the homestead allotment of Emma Derrisaw, deceased, since the death of Emma Willingham, nee Emma Derrisaw, for her sole use and benefit. And further deny that Doc Willingham never was at any time the lawful husband of the said Emma Willingham, nee Derrisaw, and that the said Julia Willingham was born prior to March 4, 1906, and deny that Julia Willingham is not entitled to interest only on said royalties during her lifetime or until April 26, 1931. And deny that the orators in complaint are entitled to a one-third part or interest each in the principal sum of said royalties.

X.

Respondents deny all of paragraph 5 in plaintiffs' petition.

XI.

Respondents deny that part of paragraph 8, in which plaintiffs allege and ask that defendants be decreed to pay unto the orators in complaint an equal one-third of the royalties aforesaid, now due or hereafter to be collected, and allege they are not entitled to the relief upon the general facts alleged in their complaint. And deny that the proper construction of the said section 9 of said act of Congress approved May 27, 1908, that by said act the orators in the complaint be entitled to an equal one-third interest in the principal sum or share in said royalties, subject only to the use thereof of the said Julia Willingham; that is to say, the interest thereon during her lifetime or until March 4, 1931.

XII.

For cross petition respondents allege that by reason of the provision of section 9 of an act of Congress approved May 27th, 1908, entitled "An act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes and for other purposes," that Julia Willingham, having been born on the 11th day of February, 1907, under conditions of said act she is entitled to the use and benefit of the homestead of Emma Willingham, nee Emma Derrisaw, deceased.

XIII.

That since the sole heirs and purported heirs of Emma Willingham, nee Derrisaw, deceased, did enter into an oil and gas mining lease dated October 3, 1912, to J. A. Chapman, that said lease was approved by the Secretary of the Interior, and that said lease was then transferred to the Prairie Oil & Gas Company, and approved by the Secretary of the Interior, and that said heirs did then and there approve of the boring for oil upon said premises, by which royalties have accrued, and by their acts and deeds that said royalties should be paid to E. H. Walker, as the duly appointed, qualified, and acting guardian of Julia Willingham, as he is entitled to
11 the custody and control of her property. That by the acts of the surviving heirs of Emma Willingham, deceased, in giving an oil and gas lease there has been a penetration and opening of the soil in boring for oil, which may be worked even to exhaustion, by the life tenant; and that Julia Willingham being the life tenant, or tenant until April 26, 1931, she is entitled to the sole use and benefit of any revenue that may be derived from the homestead allotment of Emma Derrisaw, afterwards Emma Willingham, deceased.

XIV.

It is further shown to the court that Julia Willingham was born on the 11th day of February, 1907, and is a full-blood Creek Indian, and is the only surviving heir of Emma Willingham, deceased, born after the 4th day of March, 1906. That Emma Willingham was the mother of Julia Willingham and departed this life the 17th day of November, 1908, and by virtue thereof Julia Willingham, a minor, being the only surviving heir born after March 4, 1906, is entitled to the use and benefit of the homestead allotment, being described as follows, to wit:

The southwest quarter of the southeast quarter of section thirty-two (32), township eighteen (18) north, range seven (7) east.

It is further shown to the court that Emma Willingham, nee Emma Derrisaw, was a full-blood Creek Indian duly enrolled as such under Roll No. 7246.

Wherefore, the premises considered, your respondent, Julia Willingham, a minor, by E. H. Walker, as her duly qualified and acting

guardian, would ask that the plaintiffs in this cause of action be debarred from claiming any right, title, or interest during her lifetime, or until April 26th, 1931, in and to the homestead allotment of Emma Derrisaw described as follows, to wit:

The southwest quarter of the southeast quarter of section thirty-two (32), township eighteen (18) north, range seven (7) east.

And that it be decreed by this honorable court that the said Dana H. Kelsey, superintendent of Indian agency, be authorized and instructed to turn over to E. H. Walker, the proper custodian of the estate of Julia Willingham, the sum of fifteen thousand dol-
12 lars or any other money or monies which is now in his hands and have accumulated as revenue upon the aforesaid described real estate, and that said amount is justly due her according to section 9 of right to alienate as effected by the provision of an act of Congress of May 27, 1908, entitled "An act for the removal of restrictions from part of the lands of the Five Civilized Tribes, and for other purposes." That said act provides that "If any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one for the use and support of such issue during her life or lives or until April 26, 1931. And ask that plaintiffs take nothing by their complaint and that defendants be given such other and further relief as is just.

C. H. TULLY,
Attorney for Julia Willingham, a Minor,
E. H. Walker, Her Legal Guardian.

STATE OF OKLAHOMA, *McIntosh County:*

I, E. H. Walker, the duly appointed, qualified, and acting guardian of Julia Willingham, a minor, of lawful age, being first duly sworn upon oath depose and say, that I have read the above and foregoing answer and cross petition and that the allegations and statements therein contained are true to the best of my knowledge and belief.

E. H. WALKER.

Subscribed and sworn to before me this 26th day of March, 1914.
[SEAL.] LUCY SHAW,
Notary Public.

My commission expires January 26, 1916.

(Endorsed:) Filed Mar. 27, 1914, and refiled Jul. 14, 1914, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

And, to wit, on the 10th day of April, A. D. 1914, the defendants, Dana H. Kelsey, as United States Indian superintendent Union

Agency, and W. M. Baker, as general disbursing agent, Union Agency, filed their answer herein, which is in words and figures as follows:

13 *Separate answer of the defendants, Dana H. Kelsey as U. S. Indian superintendent, Union Agency; and W. M. Baker, general disbursing agent, Union Agency.*

Come now the defendants, Dana H. Kelsey and W. M. Baker, and saving and reserving unto themselves all manner of exceptions to the many imperfections and insufficiences in complainants' bill contained for the separate answer to said bills, or to so much thereof as they are advised is necessary for them to answer to, say:

That they admit the plaintiffs, Tootie Riley, a minor, by U. C. Stockton, her guardian, and Thomas Riley are resident citizens of the State of Oklahoma, and

Further admit that the defendants herein named; that is to say, Dana H. Kelsey and W. M. Baker, are now, and have been at all times, as alleged in the plaintiffs' bill, officers of the Union Agency, as described in plaintiffs' bill; that is to say, Dana H. Kelsey is the United States Indian superintendent of the Union Agency and resides in Muskogee, Oklahoma, and in the eastern district thereof, and that the said W. M. Baker is general disbursing agent of the Union Agency, Muskogee, and an officer of the Interior Department of the United States and within the jurisdiction of this court, and

The defendants, further answering, say that they admit that one Emma Derrisaw was a full-blood citizen of the Creek Nation of the Five Civilized Tribes of the Indian Territory, and duly enrolled as such, but defendants are not informed and can neither affirm nor deny the date of the death of said Emma Derrisaw, but do admit that she was seized, at the time of her death, of the following described land, to wit:

The SW4 of the SE4 of section 32, township 18 N., range 7 E., in the Creek Nation, Indian Territory, now in the Creek County, State of Oklahoma, and that the same is the homestead allotment of the said Emma Derrisaw, deceased.

The defendants neither affirm nor deny the marriage of Emma Derrisaw to Thomas Riley for the reason they are not sufficiently informed, and are not sufficiently informed as to the conduct of said Thomas Riley and Emma Derrisaw to affirm or deny how long they lived together, or when they separated, nor the reason of the separation of said parties.

14 The defendants admit that Tootie Riley was born to Emma Derrisaw, deceased, and that Julia Willingham is the daughter of Emma Derrisaw, deceased, but deny that Julia Willingham was born on the 10th day of February, 1906, prior to March 4, 1906, but the defendants state that said Julia Willingham is not an enrolled citizen of the Creek Nation, and she is not on the

roll of the Five Civilized Tribes. As to the exact date of the birth of said Julia Willingham the defendants are unable to say, and require the plaintiffs to make proof according to allegation.

The defendants admit that on or about the 3rd day of October, 1912, the said Thomas Riley, in his own behalf, Doc Willingham and James Price, claiming to act as guardian of Tootie Riley, and Barney Derrisaw as guardian of Julia Willingham, executed an oil and gas mining lease, as set forth in plaintiffs' bill, to one James A. Chapman, which was approved by the Secretary of the Interior and is now in force and effect, and that there was a certain interest assigned by the said James A. Chapman to the Prairie Oil & Gas Company, and the defendants admit that operations for oil and gas mining purposes have been prosecuted on said land, and that oil has been found in paying quantities, as alleged in plaintiffs' bill, and that the defendants herein have the custody of certain funds arising in royalty therefrom.

Further answering, the defendants say that they have not at any time, and are not now combining and confederating with divers persons against the plaintiffs herein to deprive them of any interest which they may have in the subject matter of this controversy, or in interest which they may have by virtue of being heirs of the said Emma Derrisaw; that they have no interest except to see that royalty is paid to the parties entitled thereto, and

The defendants, further answering, say that if the court should find that Emma Derrisaw died on or about the 17th day of November, 1907, and that Julia Willingham was born prior to March 4, 1906, that a decree be entered accordingly. But, should the court find that Thomas Riley and Emma Derrisaw were husband and wife, and that Julia Willingham was born since March 4, 1906, and the issue of said Emma Derrisaw, the defendants herein allege that the said Tootie Riley would not be entitled to any of the proceeds arising from the homestead allotment of Emma Derrisaw, deceased, during the lifetime of Julia Willingham until April 26, 1931, and the courts should so decree.

15 The defendants herein further pray the court to enter a decree declaring the heirs of Emma Derrisaw, deceased; to find and declare when the descent of the estate of Emma Derrisaw was cast and to find and declare who are entitled to share in the distribution of the funds now in the care and custody of the defendants herein, and the proportionate parts that each interested party should receive; and in the event the defendants herein are decreed to pay out said funds that the court direct same to be paid out and distributed in compliance with the regulations prescribed by the Honorable Secretary of the Interior.

ARCHIBALD BONDS,
Assistant United States Attorney, Solicitor for Defendants, Dana H. Kelsey and W. M. Baker.

(Endorsed:) Filed Apr. 10, 1914, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

And, to wit, on the 6th day of July, A. D. 1915, the parties hereto filed stipulation as to facts, which is in words and figures as follows:

Stipulation as to facts.

Comes now Gabe E. Parker, superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, United States Indian superintendent, Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency, by D. H. Linebaugh, United States attorney, and Carter Smith, assistant United States attorney, their solicitors of record, and the plaintiffs, Tootie Riley, by U. C. Stockton, her guardian, and Thomas Riley by their solicitors of record, LaFayette Walker and Horton & Smith and Doc Willingham, Julia Willingham, by E. H. Walker, her guardian ad litem, by C. H. Tully, their solicitor of record, and the Prairie Oil & Gas Company, by W. S. Fitspatrick, its solicitor of record, and agree and stipulate that the following are the facts proven in this suit, which is a suit to determine to whom and in what amounts certain royalties, accumulated in the hands of Gabe E. Parker, superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, United States Indian superintendent, Union Agency, and W. M. Baker, cashier
16 and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency, derived from a certain oil and gas mining lease should be distributed, and said agreed statement is submitted in lieu of the evidence had at the trial.

It is accordingly stipulated and agreed that one Emma Derrisaw was a duly enrolled full-blood member of the Creek Tribe of Indians and the plaintiff, Tootie Riley, is her illegitimate child by the plaintiff, Thomas Riley; that Thomas Riley and Emma Derrisaw were never married according to the laws of the Creek Nation or according to the laws of Arkansas in force in the Indian Territory, nor was their relation such as to constitute a common-law marriage. Some two or three years after the birth of Tootie Riley and in July, 1905, Emma Derrisaw married the defendant, Doc Willingham, and as a result of their marriage the defendant, Julia Willingham, was born to Doc Willingham and Emma Derrisaw Willingham on February 11, 1907. During her lifetime there was allotted to Emma Derrisaw Willingham as a homestead allotment in the Creek Nation the land involved in this controversy of which she was seized in fee at the time of her death. Emma Derrisaw Willingham died in November, 1908, leaving surviving her her husband, Doc Willingham, Tootie Riley, her illegitimate child by Thomas Riley, and Julia Willingham, her child by her husband, Doc Willingham. On October 13, 1912, Thomas Riley, Tootie Riley, a minor, by her guardian, Doc Willingham for himself, and Julia Willingham, by her guardian, jointly executed an oil and gas mining lease upon the lands in controversy in accordance with the rules and regulations prescribed by

the Secretary of the Interior to James H. Chapman, which lease was duly approved by the Secretary of the Interior and was thereafter assigned by Chapman to the defendant, Prairie Oil and Gas Company, and which assignment was duly approved by the Secretary of the Interior. The execution of said oil and gas lease was duly authorized and approved by the county courts having jurisdiction of the estate of said minors, Tootie Riley and Julia Willingham, in manner and form as provided by law.

Pursuant to this lease oil wells have been drilled upon the property resulting in oil production, royalties from which, as provided by the lease, in the amount of over fifteen thousand dollars have accumulated in the hands of Gabe E. Parker, superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, United
17 States Indian superintendent, Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency. That at the time of the death of Emma Derrisaw no development for oil or gas had been made on the land, and it was not known that the same contained oil or gas.

This agreed statement of facts and the pleadings filed, the oil and gas lease and the memorandum opinion and the decree of the court shall be taken and considered as the parts of the record necessary for the consideration of the errors assigned by Gabe E. Parker, superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, United States Indian superintendent, Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency.

HORTON & SMITH AND
LAFAYETTE WALKER,
Solictors of record for the plaintiffs, Tootie Riley, a minor, by U. C. Stockton, her guardian, and Thomas Riley.

C. H. TULLY,
Solictors of record for the defendants, Doc Willingham, Julia Willingham, a minor, and E. H. Walker, her guardian ad litem.

W. S. FITZPATRICK,
Solictors of record for the defendants, Prairie Oil & Gas Company, a corporation

D. H. LINEBAUGH,
CARTER SMITH,
Solicitors of record for Gabe E. Parker, Superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, United States Indian Superintendent Union Agency, and W. M. Baker, Cashier and Special Disbursing Agent for the Five Civilized Tribes, successor to W. M. Baker, General Disbursing Agent, Union Agency.

I hereby approve the above stipulation and statement of facts this the 6th day of July, 1915.

RALPH E. CAMPBELL, *Judge.*

18 Received Union Agency, Oct. 23, 1912. Enclosure No. 57403.
Office of Indian Affairs. Received Oct. 28, 1912. File 107436.
Office of Indian Affairs. Received Feb. 11, 1913. 17932.
Office of Indian Affairs. Received Jan. 28, 1915.
Received Supt. Five Tribes, Enclosure to Dept. No. 1903.
Royalty No. 6678.
Southern Surety Co. J. L.

Duplicate, 23970.

Form A Series 1908—Approved April 20, 1908. Amended February 6 and June 29, 1911.

Oil and gas mining lease upon land selected for allottment.

Creek Nation, Oklahoma.

This indenture of lease, made and entered into in quadruplicate on this 3rd day of October, A. D. 1912, by and between Thomas Riley, guardian of Tootie Riley, a minor, Thomas Riley, Joe Willingham, James M. Price, guardian of Tootie Riley, and Barney Derrisaw, guardian of Julia Wellingham, sole heirs at law of Emma Derrisaw, deceased, enrolled as a full-blood citizen of the Creek Nation, Roll No. 7246, parties of the first part, hereinafter designated as lessors, and James A. Chapman, of Tulsa, Oklahoma, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the act of Congress approved May 27, 1908 (35 Stat. L. P. 312), witnesseth:

1. The lessor, for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil or gas is found in paying quantities, all the oil deposits and natural gas in or under the following described tract of land, lying and being within the county of Creek and State of Oklahoma, to wit, the southwest quarter of the southeast quarter of section 32, township 18 N., range 7 E. of the Indian meridian, and containing 40 acres, more or less, with the exclusive right to prospect for, extract, pipe, store, and remove
19 oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or

other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the United States Indian superintendent, Union Agency, Muskogee, Oklahoma, for the lessor as royalty the sum of 12½ per cent of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale or removal of the oil. And the lessee shall pay as royalty on each gas-producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, however, In the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty which will become effective as a part of this lease: Provided, further, That in cases of gas wells of small volume or where the wells produce both oil and gas or oil and gas and salt water to such an extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the lessee shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor shall have the free use of gas for domestic purposes in his residence on the leased premises provided there be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lessee to use a gas-producing well, which can not profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas-producing privileges the lessee shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas on each gas-producing well, gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to the superintendent, Union Agency, Muskogee, Oklahoma, for lessor, as advance annual royalty, from the date of the approval of this lease, fifteen cents per acre per annum, annually, in advance, for the first and second years; thirty cents per acre per annum, annually, in advance, for the third and fourth years; seventy-five cents per acre per annum, annually, in advance, for the fifth year; and one dollar per acre per annum, annually, in advance, for each succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit

on stipulated royalties, and the lessee hereby agrees that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from its obligation to pay said advance royalty annually when it becomes due by reason of any subsequent surrender or cancellation of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on land covered by this lease and shall drill at least one well thereon within one year from the date of approval of this lease by the Secretary of the Interior or shall pay to the United States Indian superintendent, Union Agency, Muskogee, Oklahoma, for the use and benefit of the lessor for each whole year the completion of such well is delayed after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration
21 of fifteen days after it becomes due at the end of any yearly period, during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in any wise operate to release or relieve the lessee from the covenant and obligation to pay such rental or any other accrued obligation. The lessee may be required by the Secretary of the Interior or by such officer as may be designated by him for the purpose to drill and operate wells to offset wells on adjoining tracts and within three hundred feet of the dividing line, or in case of gas wells lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled or royalty paid in lieu of drilling within ten days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same and promptly surrender and return the

premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting the tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee, and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well
22 shall securely plug the same so as effectually to shut off all water from the oil-bearing stratum or in the manner required by the laws of the State of Oklahoma.

6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property and upon all of the unsold oil obtained from the land herein leased as security for payment of said royalty.

7. The lessee may at any time, by paying to the Indian superintendent all amounts then due as provided herein and the further sum of one dollar, surrender and cancel this lease and be relieved from all further obligations or liability thereunder: Provided, If this lease has been recorded lessee shall execute a release and record the same in the proper county recording office: Provided, further, In event restrictions are removed from all leased premises the lessee may surrender all the undeveloped portion thereof by paying the lessor all amounts then due and the further sum of one dollar, which surrender shall not affect the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, however, That no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease the Secretary of the Interior (or lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall

have the right at any time after thirty days' notice to the lessee specifying the terms or conditions violated to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

23 10. Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said Secretary, conditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian Office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restriction on alienation shall be removed from all the leasehold premises described above, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to the United States Indian superintendent shall thereafter be made to lessor or the then owner of said lands in person or be deposited to the credit of said lessor or his assigns at the State National Bank of Holdenville, Okla., or at such other place as the said lessor or his assigns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and lawful assigns of the parties hereto.

14. In witness whereof the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

THOMAS RILEY, [SEAL.]
Guardian Tootie Riley, a minor.
THOMAS RILEY. [SEAL.]
Doc (his x mark) WILLINGHAM. [SEAL.]

24 The name of Doc Willingham written and witnessed by me in his presence and at his request. K. B. Turner, Eufaula, Oklahoma, witness.

JAMES M. PRICE,
Guardian of Tootie Riley.
BARNEY (his x mark) DERRISAW,
Guardian of Julia Willingham.

The name of Barney Derrisaw written and witnessed by me in his presence and at his request. K. B. Turner, Eufaula, Okla., witness.

Attest: Two witnesses to execution by lessors: Martin Goat, P. O. Holdenville, Okla.; Bruce McKinley, P. M., P. O. Eufaula, Okla.

JAMES A. CHAPMAN.

Two witnesses to execution by lessee: Harry H. Rogers, P. O. Holdenville, Okla.; Benj. Mossman, Muskogee, Okla.

STATE OF OKLAHOMA, *County of Hughes, ss:*

——— before me, Martin Goat, a notary public, in and for said county and State, on this 3rd day of October, 1912, personally appeared Thomas Riley, guardian of Tootie Riley, a minor, and Thomas Riley, to me known to be the identical persons who executed the within and foregoing lease, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

MARTIN GOAT, *Notary Public.*

My commission expires March 25, 1914.

(Endorsed): Received Nov. 13, 1912, Union Agency, Dept. No. 3410.

DEPARTMENT OF THE INTERIOR,
UNITED STATES INDIAN SERVICE, UNION AGENCY,
Muskogee, Okla., Oct. 25, 1912.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it approve. See my report of even date.

DANA H. KELSEY,
United States Indian Superintendent.

6678 Duplicate.

25

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., Oct. 31, 1912.

Respectfully submitted to the Secretary of the Interior, with recommendation that it be approved.

C. P. HAUKE,
Second Assistant Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Nov. 9, 1912.

Approved.

LEWIS C. LAYLIN,
Assistant Secretary of the Interior.

Filed for record this 23 day of October, 1912, at 2 o'clock p. m.
DANA H. KELSEY, *Supt. Union Agency,*
By C. J. KLICK a/c

Advance royalty received, $6.00.

STATE OF OKLAHOMA, *County of McIntosh, ss:* Duplicate.

Before me, Vera L. Lane, a notary public within and for said county and State, on this 11th day of October, 1912, personally appeared Doc Willingham, for himself, and James M. Price, as the guardian of Tootie Riley, a minor, and Barney Derrisaw, as the guardian of Julia Willingham, a minor, to me known to be the identical persons who executed the within and foregoing lease and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

VERA L. LANE,
Notary Public.

My com. expires July 18, 1914.

5–154r Lease No. 23970

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Mar. 9, 1915.

The assignment of an undivided one-half interest in this lease by James A. Chapman, lessee, to the McMan Oil Company is approved, effective only from date of approval, subject to the orders and regulations of this department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior and the royalty shall be 12½ per cent on such price basis.

BO SWEENEY,
Assistant Secretary.

26 Lease No. 23970

DEPARTMENT OF THE INTERIOR,
Washington, D. C., Feb. 17, 1913.

The assignment of an undivided half interest in this lease by James A. Chapman to the Prairie Oil & Gas Company is approved with the understanding and provision that no rights, claims, or equities, as against future action by or under authority of Congress respecting oil or gas pipe-line companies, shall be predicated upon this approval and subject to the orders and regulations of this department now existing or hereafter to be promulgated. The price basis for computation of royalty on oil shall be the market price as ascertained and declared by the Secretary of the Interior, and the royalty shall be 12½ per cent of such price basis.

LEWIS C. LAYLIN,
Assistant Secretary. WCP

Endorsed: Office of Indian Affairs. Received Jan. 28, 1915. 10490.

Endorsed: Office of superintendent for the Five Civilized Tribes, Muskogee, Okla. This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes

of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of oil & gas lease No. 23970. Gabe E. Parker, superintendent for the Five Civilized Tribes, by W. J. Farver, clerk. In charge ------ Records. Date, July 2, 1915. (Seal.)

Endorsed: Filed Jul. 6th, 1915, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

And, to wit, on the 2nd day of November, A. D. 1914, the court filed its memorandum of opinion herein, which is in words and figures as follows:

Opinion.

CAMPBELL, *D. J.*:

From the evidence and admissions in the pleadings in this case the facts are found to be substantially as follows: Emma Derrisaw was a duly enrolled full-blood member of the Creek tribe of Indians.
27 The plaintiff, Tootie Riley, is her illegitimate child by the plaintiff, Thomas Riley. Thomas Riley and Emma Derrisaw were never married according to the laws of hte Creek Nation, nor according to the laws of Arkansas in force in Indian Territory, nor were their relations such as to constitute a common-law marriage. Some two or three years after the birth of Tootie Riley and in July, 1905, Emma Derrisaw married the defendant, Dock Willingham. As a result of this marriage the defendant, Julie Willingham, was born to Dock Willingham and Emma Derrisaw Willingham on February 11, 1907. During her lifetime there was allotted to Emma Derrisaw Willingham, as her homestead allotment in the Creek Nation, the land involved in this controversy, of which she was seised in fee at the time of her death. She died intestate in November, 1908, leaving surviving her Dock Willingham, her husband, Tootie Riley, her illegitimate child by Thomas Riley, and Julie Willingham, her child by her husband, Dock Willingham. On October 3d, 1912, Thomas Riley, Tootie Riley, then a minor, by her guardian, Dock Willingham, for himself, and Julie Willingham, by her guardian, executed an oil and gas mining lease upon the land in controversy in accordance with the rules and regulations prescribed by the Secretary of the Interior, to one James A. Chapman, which lease was duly approved by the Secretary of the Interior, and was thereafter, with the approval of the Secretary, assigned by Chapman to the defendant Prairie Oil & Gas Company. Pursuant to this lease oil wells have been drilled upon the property, resulting in oil production royalties from which, as provided by the lease, now amounting to over fifteen thousand dollars, have accumulated in the hands of the defendant, Dana H. Kelsey, as United States Indian superintendent, Union Agency. The question to be determined is to whom and in what amounts these royalties should be distributed by the Indian superintendent.

When Emma Derrisaw Willingham died in November, 1908, the law of Oklahoma controlled the devolution of her estate (Bartlett v. Okla. Oil Co., not officially reported), and under that law her husband, Dock Willingham, and her children, Tootie Riley and Julie Willingham, would each be entitled to inherit a one-third interest in her real and personal property. Under the act of Congress approved May 27, 1908, the land in controversy, being the homestead allotment of a full-blood Creek Indian, was inalienable during the lifetime of the allottee, Emma Derrisaw Willingham, but by the same act of Congress it was provided:

28 "SEC. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April 26th, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April 26th, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

The allottee having died leaving her child, Julie Willingham, surviving her, born after March 4th, 1906, the case falls within the second proviso of the section just quoted; that is, "that if any member of the Five Civilized Tribes shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue during their life or lives, until April 26th, 1931." While the general effect of the section, aside from the provisos, is to make the death of any allottee operate to remove all restrictions upon the alienation of his allotted lands, the effect of the second proviso is to make the existence of surviving issue, born after March 4, 1906, operate to extend restrictions upon the alienation of the homestead until April 26, 1931, or until the death of such surviving issue, if that occur prior to the last-mentioned date. In other words, in such case the

homestead continues inalienable after the death of the allottee.
29 just as it was before his death. The allottee before his death, owner in fee of the homestead, of course had the right of possession and occupancy of the homestead for his use and support; that is, such use and support as he might derive from it by means other than alienation. At the death of the allottee, intestate, the title to the homestead of course vests in his heirs. But, if there be among them a child or children born after March 4, 1906, then it still remains inalienable, pending the term provided for in such contingency, and such child or children by force of the act have the same right of possession and occupancy for their use and support which their ancestor had during his life, to the exclusion of the other heirs, for the term of years extending from the death of the allottee to April 26, 1931, or to the date of the death of such child or children if that shall happen before the last-mentioned date. But the use and support which such child or children are permitted to derive from the land is only such use and support as they may derive from it by means other than alienation for it continues inalienable. The use permitted therefore could not have contemplated the leasing of the land by such child or children for oil and gas purposes, because the taking of the oil and gas under the right granted by an oil and gas lease amounts to a disposition of that portion of the very corpus of the property represented by the oil and gas, and is to that extent an alienation of a portion of the land. Eldred v. Okmulgee Loan & Trust Co., 22 Okla. 742; Moore v. Sawyer, 167 Fed. 826. The use contemplated by the act was clearly only its use for agricultural or grazing purposes or such other use as would not conflict with the provision against alienation of the land. The language of the act is that the land is to remain inalienable for the use and support of such child or children, clearly contemplating that such use and support shall not involve any alienation of the land itself. It is further provided that this restriction against alienation of the land may be removed by the Secretary of the Interior at any time within the term. If this shall occur then the heirs may join in a sale of the land immediately upon the removal of such restrictions, and the proceeds of such sale would be divided among the heirs according to their several interests. Such removal of restrictions from the land would terminate the right of children born after March 4th, 1906, to the exclusive occupancy of the land for their use and support.

It follows that in this case the execution by Julie Willing-
30 ham, through her guardian, of the oil and gas lease referred to was not authorized by virture of that provision of the law above considered which continued restrictions upon the land for her use and support. But by section 2 of the act it is provided "That leases of restricted lands for oil and gas or other mining purposes * * * may be made with the approval of the Secretary of the Interior under rules and regulations provided by the Secre-

tary of the Interior and not otherwise." We have seen that under the circumstances of this case the land in controversy continues to be restricted land by reason of the birth of Julie Willingham after March 4th, 1906; but the last-quoted provision of the act authorizes the leasing of restricted lands for oil and gas and other mining purposes with the approval of the Secretary of the Interior. Under this provision of the act, notwithstanding the continuation of the restrictions upon the land, the several heirs might join in an oil and gas lease upon the land with the Secretary's approval. This was done. It has resulted in the development of the property and the discovery of oil by the assignee of the lessee, the taking of a large amount of oil therefrom, resulting in the royalties mentioned. The money accruing from these royalties under the terms of the lease in effect represents the proceeds of the sale of the oil taken from the land. If the Secretary had removed the restrictions from the land and the heirs had sold it each of the three heirs would have been entitled to one-third of the proceeds. The taking of the oil under the lease approved by the Secretary effects the sale of that portion of the land represented by the oil, and each of the three heirs is entitled to his one-third share of the proceeds of that sale; that is, one-third of the accumulated royalties. The use and support from the land, as restricted land, to which Julie Willingham is entitled does not contemplate that she may lease the land for oil and gas purposes, for, as we have seen, that is an alienation inconsistent with restrictions. Therefore the taking of the oil under the lease can not be said to in any way conflict with the use of the land which the statute gives her for her support. Therefore the contention that she is entitled, in addition to her share of the royalties, to interest upon the entire amount of the royalties can not be sustained.

Decree may enter herein ordering and directing the defendants, Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, general disbursing agent, Union Agency, to pay to the defendant, Dock Willingham, and to the guardian
31 of the plaintiff, Tootie Riley, and to the guardian of the defendant, Julie Willingham, each one-third of the accumulated royalties now in his hands arising from the production of oil and gas from said land, such payments to be made in accordance and compliance with the rules and regulations prescribed by the Secretary of the Interior in such cases.

RALPH E. CAMPBELL, *Judge.*

(Endorsed:) Filed in open court Nov. 2, 1914, R. P. Harrison, clerk, United States District Court, Eastern District Oklahoma.

And, to wit, on the 18th day of November, A. D. 1914, the same being one of the days of a special session of the United States District Court for the Eastern District of Oklahoma, held at Muskogee, Oklahoma. Court met pursuant to adjournment. Present and presiding, the Honorable Ralph E. Campbell, judge.

Among the proceedings had on this day is the following:

Decree.

This cause came on to be heard at the September term of said court on the 21st day of September, 1914, and was continued for further hearing to the 1st day of October, 1914, and was heard and argued by counsel, and was continued for advisement to this 18th day of November, of the special, 1914, term of this court, and thereupon upon consideration thereof,

It is ordered, adjudged, and decreed that the plaintiff, Thomas Riley, take nothing by this suit.

It is further ordered, adjudged, and decreed that the defendants, Dana H. Kelsey, as United States Indian superintendent Union Agency, and W. M. Baker, general disbursing agent, Union Agency, pay to the defendants, Doc Willingham, U. C. Stockton, as guardian of Tootie Riley, a minor, and E. H. Walker, as guardian of Julia Willingham, a minor, each one-third of the accumulated royalties now in their hands or hereafter accruing arising from the production of oil and gas from the southwest quarter of the southeast quarter of section 32, township 18 north, range seven east, in Creek County, State of Oklahoma, being the homestead allotment of Emma Derrisaw, deceased, such payments to be made in accordance with the rules and regulations of the Secretary of the Interior in such cases provided.

32 To which order of the court the defendants, Dana H. Kelsey and W. M. Baker, ask and are allowed their exceptions.

It is further found and decreed that the said Emma Derrisaw Willingham, nee Derrisaw, died in November, 1908, leaving surviving her as sole heirs at law two children, to wit, Tootie Riley and Julia Willingham, and Doc Willingham, her lawful husband; that Julia Willingham was born on the 11th day of February, 1907; that Tootie Riley was born during the year 1901, and that Doc Willingham and Emma Derrisaw lawfully intermarried during the month of July, 1905.

It is further ordered and decreed that the costs of this action be taxed equally against Doc Willingham, U. C. Stockton, as guardian of Tootie Riley, a minor, and E. H. Walker, as guardian of Julia Willingham, a minor.

RALPH E. CAMPBELL, *Judge.*

And, to wit, on the 14th day of May, A. D. 1915, the following proceedings were had in this cause. The Honorable Ralph E. Campbell, judge, presiding:

Order substituting Gabe E. Parker, superintendent for the Five Civilized Tribes, for Dana H. Kelsey, United States Indian superintendent, Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, for W. M. Baker, general disbursing agent, Union Agency.

Order.

It having been suggested to the court in open court that Gabe E. Parker, superintendent for the Five Civilized Tribes, has succeeded to the office, duties, and authority of Dana H. Kelsey, as United States Indian superintendent, Union Agency, defendant herein, and, whereas, W. M. Baker, as general disbursing agent, Union Agency, has succeeded himself and to the duties and authority of the general disbursing agent, Union Agency, as W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, and that Gabe E. Parker, as superintendent for the Five Civilized Tribes, should be substituted as defendant herein for Dana H. Kelsey as United States Indian superintendent, Union Agency, and W.
33 M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, should be substituted as defendant herein for W. M. Baker, as general disbursing agent, Union Agency, and the court being fully advised in the premises.

It is therefore ordered, adjudged, and decreed that Gabe E. Parker, superintendent for the Five Civilized Tribes, be substituted as defendant herein for Dana H. Kelsey, as United States Indian superintendent, Union Agency, and that W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, be substituted as defendant herein for W. M. Baker, as general disbursing agent, Union Agency.

Done in open court this the 14th day of May, 1915.

RALPH E. CAMPBELL, *Judge.*

(Endorsed:) Filed May 14, 1915, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

And, to wit, on the 15th day of May, A. D. 1915, the defendants, Gabe E. Parker, as superintendent for the Five Civilized Tribes, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, filed their petition for allowance of appeal herein, which appeal was allowed by the court. Said petition for allowance of appeal, assignment of errors, and order allowing appeal are in words and figures as follows:

Petition and application for an appeal.

Comes now the defendants, Gabe E. Parker, as superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, defendants in the above-entitled cause, and feeling themselves aggrieved by the final decree made and entered in the above cause on the 18th day of November, 1914, do hereby in open court appeal from said decree and order to the United States Circuit Court of Appeals

for the Eighth Circuit for the reasons and upon the grounds specified in their assignment of errors, which is submitted and filed herewith; and said defendants pray that an appeal may be allowed and that a transcript of the record, proceedings, and papers upon
34 which said decree and order were based, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

D. H. LINEBAUGH,
United States Attorney,
CARTER SMITH,
Assistant United States Attorney,
Solicitors for Said Defendants.

(Endorsed:) Filed May 15, 1915, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

Assignment of errors.

Come now the defendants, Gabe E. Parker, as superintendent for the Five Civilized Tribes, as successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, and show that the final decree entered in the above-entitled cause on the 18th day of November, 1914, is erroneous and unjust to these defendants and to the defendant, Julia Willingham, a minor and ward of the United States. And the defendants, Gabe E. Parker, as superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency, therefore now file the following assignment of errors upon which they will rely in this appeal from the said decree for a reversal of same.

1.

The court erred in ordering, adjudging, and decreeing that the defendants, Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, general disbursing agent, Union Agency, pay to the defendants, Doc Willingham, U. C. Stockton, as guardian of Tootie Riley, a minor, and E. H. Walker, as guardian of Julia Willingham, a minor, each one-third of the accumulated royalties now in their hands, or hereafter accruing, arising from the production of oil and gas from the

Southwest quarter of southeast quarter of section thirty-two
35 (32), township eighteen (18) north, range seven (7) east, in Creek County, State of Oklahoma, being the homestead allotment of Emma Derrisaw, deceased. To which order, judgment, and decree these defendants at the time excepted and their exceptions were allowed.

2.

The court erred in not finding, concluding, and holding that the leasing of said land for oil and gas purposes was not an alienation of land within the meaning of the act of Congress imposing restrictions upon the alienation of lands, providing that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable unless the restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner as provided by law for the use and support of such issue during their life, or lives, or until April 26, 1931.

3.

The court erred in not finding, concluding, holding, and decreeing that the said defendants, Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, general disbursing agent, Union Agency, should pay to the defendant, E. H. Walker, as guardian of Julia Willingham, the entire accumulated royalties now in their hands, or hereafter accruing, arising from the production of oil and gas from the homestead allotment of Emma Derrisaw, deceased.

4.

The court erred in not finding, concluding, holding, and decreeing that, if the leasing of the homestead allotment of Emma Derrisaw, deceased, for oil and gas purposes was an alienation of said lands within the meaning of the act of Congress imposing restrictions and limitations upon same, that the defendants, Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, general disbursing agent, Union Agency, should pay to E. H. Walker, as guardian of Julia Willingham, a minor, in accordance with the rules and regulations of the Secretary of the Interior in such cases provided, the entire accumulated royalties now in their hands, or hereafter accruing, arising from the production of
36 oil and gas from the homestead allotment of Emma Derrisaw, deceased, and that the said Julia Willingham is, and should be, entitled to the enjoyment of the fund (i. e., interest thereon) during her life, or until April 26, 1931, then that said fund should be distributed to the heirs of Emma Derrisaw, deceased.

5.

That the court erred in not finding, concluding, and holding and decreeing that the said Julia Willingham, a minor, is, and should be, entitled to the enjoyment of the entire accumulated royalties, or hereafter accruing, arising from the production of oil and gas from the homestead allotment of Emma Derrisaw, deceased (i. e., interest thereon) during her life or until April 26, 1931.

Wherefore, these defendants pray that said final decree of the court be reversed and the District Court of the United States for the Eastern District of Oklahoma be directed to set aside the decree rendered by it on the 18th day of November, 1914, and to proceed in said cause and enter such final decree and judgment as will give the defendants the relief prayed for in their answer.

D. H. LINEBAUGH,
United States Attorney.
CARTER SMITH,
Assistant United States Attorney.

(Endorsed:) Filed May 15, 1915, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

Order allowing appeal.

Now comes on for hearing in open court the petition and application of the defendants, Gabe E. Parker, as superintendent for the Five Civilized Tribes, as successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, for an appeal, and the said petition and application having been fully considered, and the court being fully advised in the premises, it is therefore considered and ordered that the said petition and application be allowed and granted and the appeal therein prayed is this day allowed in open court. Appeal bond fixed in the sum of $500.00.

37 Done in open court this the 15th day of May, 1915.

RALPH E. CAMPBELL, *Judge.*

(Endorsed:) Filed May 15, 1915, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

Bond on appeal.

Know all men by these presents, that we, Gabe E. Parker, as superintendent to the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, as principals, and William S. Boren and F. W. Sunderwirth, as sureties, acknowledge ourselves to be jointly indebted to Tootie Riley, a minor, and to U. C. Stockton, as her guardian, Doc Willingham, Julia Willingham, a minor, and the Prairie Oil and Gas Company, a corporation, appellees in the above-entitled cause in the sum of five hundred ($500.00) dollars, conditioned that, whereas, on the 18th day of November, 1914, in the District Court of the United States for the Eastern District of Oklahoma in a suit pending in that court wherein Tootie Riley, a minor, by U. C. Stockton, her guardian, and Thomas Riley were plaintiffs, and Dana H.

Kelsey, as United States Indian superintendent, Union Agency, W. M. Baker, as general disbursing agent, Union Agency, Doc Willingham, Julia Willingham, a minor, and the Prairie Oil and Gas Company, a corporation, were defendants, numbered on the docket No. 2034–E, and decree was rendered against the said Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as general disbursing agent, Union Agency. And the said Gabe E. Parker, as superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, having obtained an appeal to the United States Circuit Court of Appeals for the Eighth Circuit and filed a copy thereof in the office of the clerk of the court to reverse said decree and a citation directed to Tootie Riley, a minor, U. C. Stockton, her guardian, Thomas Riley, Doc Willingham, Julia Willingham, a minor, E. H. Walker, her guardian, and the
38 Prairie Oil and Gas Company, a corporation, citing and admonishing them to be and appear at the session to be holden in the city of St. Louis, in the State of Missouri, 60 days from and after the date of said citation, which is the date, to wit, the 15th day of May, 1915.

If the said Gabe E. Parker, as superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, above named as principals, shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

GABE E. PARKER,
Superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as U. S. Indian Superintendent, Union Agency;

W. M. BAKER,
Cashier and Special Disbursing Agent for the Five Civilized Tribes, Principals.

WILLIAM S. BOREN,
F. W. SUNDERWIRTH,
Sureties.

Approved the 15th day of May, 1915.

RALPH E. CAMPBELL,
Judge of the United States District Court for the Eastern District of Oklahoma.

(Endorsed:) Filed May 15, 1915, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

Citation.

The United States of America to Tootie Riley, a minor, U. C. Stockton, her guardian, Thomas Riley, Doc Willingham Julia Willingham, a minor, E. H. Walker, her guardian, and the Prairie Oil & Gas Company, a corporation, greeting:

You are hereby commanded and admonished to be and appear in the United States Circuit Court of Appeals for the
39 Eighth Circuit at the city of St. Louis, State of Missouri, 60 days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States District Court for the Eastern District of Oklahoma, wherein the defendants, Gabe E. Parker, superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency, are appellants, and Tootie Riley, a minor, U. C. Stockton, her guardian, Thomas Riley, Doc Willingham, Julia Willingham, a minor, E. H. Walker, her guardian, and the Prairie Oil & Gas Company, a corporation, are appellees, and show cause, if any there be, why the judgment and decree rendered against the said Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, general disbursing agent, Union Agency, defendants in said decree mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Honorable Ralph E. Campbell, judge of the United States District Court for the Eastern District of Oklahoma, this the 15th day of May, 1915.

RALPH E. CAMPBELL,
Judge of the United States District Court for the Eastern District of Oklahoma.

Service of the foregoing citation by delivery of a copy thereof is acknowledged this the 17th day of May, 1915, without any waiver as to the time and manner of said service.

HORTON & SMITH,
LAFAYETTE WALKER,
Solicitors of record for the plaintiffs, Tootie Riley, a minor, by U. C. Stockton, her guardian, and Thomas Riley.

Service of the foregoing citation is acknowledged by receipt of copy thereof this the 20th day of May, 1915, without waiver as to manner of service.

C. H. TULLY,
Solicitors of record for the defendants, Doc Willingham, Julia Willingham, a minor, and E. H. Walker, her guardian and guardian ad litem.

40 Service of the foregoing citation is acknowledged this the 25th day of May, 1915.

W. S. FITZPATRICK,
Solicitors of record for the defendants, Prairie Oil & Gas Company, a corporation.

Præcipe for printing record.

To the Honorable R. P. Harrison, clerk of the above-named court:

You are hereby notified that the defendants, Gabe E. Parker, superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, United States Indian superintendent, Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency, have appealed from the decree rendered against them in the above-entitled cause and elect to have a transcript of the record in said cause printed under your official supervision under the act of Congress of February 13, 1911, and respectfully request that the transcript in said cause be printed as required by law under your direction in accordance with this election. And you are requested to make a transcript of the record in the above-entitled cause to be printed and filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to the appeal allowed in said cause and to include in said transcript of record the following and no other papers or exhibits:

1. The bill of complaint and original oil and gas lease.
2. Answer and cross-complaint of Doc Willingham and Julia Willingham, by her guardian ad litem, E. H. Walker.
3. Answer of Dana H. Kelsey and W. M. Baker.
4. Stipulation as to facts.
5. Order substituting Gabe E. Parker, superintendent for the Five Civilized Tribes, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, as defendants.
6. Memorandum opinion by the court.
7. Final decree of court.
8. Petition and application of Gabe E. Parker and W. M. Baker for appeal.
9. Assignment of errors.
10. Order of court allowing appeal.

41 11. Citation and acceptance of service thereof.
12. Appeal bond.

13. This praecipe and acceptance thereof.
14. Clerk's certificate.

D. H. LINEBAUGH,
United States Attorney.
CARTER SMITH,
Assistant United States Attorney,
Solicitors of record for Gabe E. Parker, superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, U. S. Indian Supt., Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency.

We, the undersigned solicitors of record for the appellees, do hereby acknowledge service on us of the above designation of parts of the record necessary for the consideration of errors assigned by the appellants, Gabe E. Parker, superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, United States Indian superintendent, Union Agency, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency, defendants in the above-named cause, and appellants from the decree rendered therein and waive the designation of any further part, or parts, of the record and agree that the above includes all the portions of such record material and necessary for the consideration of errors assigned by the said appellants and accept service of the same and service of the above election as to the printing of the record.

Dated this the 30th day of June, 1915.

HORTON & SMITH,
LAFAYETTE WALKER,
Solicitors of record for Tootie Riley, a minor, by U. C. Stockton and Thomas Riley.

Dated this the 2nd day of July, 1915.

C. H. TULLY,
Solicitor of record for Doc Willingham, Julia Willingham, a minor, and E. H. Walker, her guardian ad litem.

42 Dated this the 23rd of June, 1915.

W. S. FITZPATRICK,
Solicitor of record for the Prairie Oil & Gas Co., a corporation.

(Endorsed:) Filed Jul. 9th, 1915, R. P. Harrison, clerk United States District Court, Eastern District of Oklahoma.

Clerk's certificate.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

I, R. P. Harrison, clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true, and correct transcript of so much of the record in the case of Tootie Riley et al. *v.* Dana H. Kelsey et al., No. 2034 Equity, as was ordered by praecipe of counsel herein to be prepared and authenticated as the same appears from the records in my office.

I further certify that the citation attached hereto and returned herewith is the original citation issued in this cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in the city of Muskogee this 9th day of July, 1915.

[SEAL.]

R. P. HARRISON, *Clerk.*
By H. E. BOUDINOT, *Deputy.*

Filed Jul. 14, 1915.

JOHN D. JORDAN, *Clerk.*

43 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

Appearance of Mr. D. H. Linebaugh and Mr. Carter Smith as counsel for appellants.

United States Circuit Court of Appeals. Eighth Circuit.

No. 4520.

GABE E. PARKER, AS SUPERINTENDENT FOR THE FIVE CIVILIZED TRIBES, etc., et al., appellants,
vs.
TOOTIE RILEY, A MINOR, ETC., ET AL.

The clerk will enter our appearances as counsel for the appellants.

D. H. LINEBAUGH,
United States Attorney.
CARTER SMITH,
Assistant U. S. Atty., Muskogee, Okla.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jul. 16, 1915.

Appearance of Mr. C. H. Tully as counsel for the appellees, Doc Willingham, et al.

The clerk will enter my appearance as counsel for the appellees, Doc Willingham, et al.

C. H. TULLY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 16, 1915.

44 Appearance of Mr. W. J. Horton and Mr. R. A. Smith, as counsel for the appellee, Tootie Riley, a minor, etc.

The clerk will enter my appearance as counsel for the appellee, Tootie Riley, a minor, by U. C. Stockton, her guardian.

W. J. HORTON,
R. A. SMITH.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 21, 1915.

Appearance of Mr. Paul Pinson as counsel for the appellants.

The clerk will enter my appearance as counsel for the appellants.

PAUL PINSON,
Special Assistant U. S. Atty., Muskogee, Okla.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 2, 1915.

Order of argument.

December Term, 1915. Monday, January 10, 1916.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Paul Pinson for appellants and continued by Mr. W. J. Horton for the appellee, Tootie Riley, and the hour for adjournment having arrived further argument is postponed until to-morrow.

45 *Order of submission.*

December Term, 1915. Tuesday, January 11, 1916.

This cause having been called for further hearing, argument was resumed by Mr. W. J. Horton for the appellee, Tootie Riley, a separate brief being submitted by Mr. C. H. Tully, counsel for Willingham, et al., the other appellees, and argument concluded by Mr. Paul Pinson for appellants.

Thereupon this cause was submitted to the court on the transcript of record from said District Court and the respective briefs of counsel filed herein.

46 *Opinion.*

United States Circuit Court of Appeals, Eighth Circuit.

No. 4520.—May Term, A. D. 1917.

GABE E. PARKER, AS SUPERINTENDENT FOR the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, appellants.

vs.

TOOTIE RILEY, A MINOR, BY U. C. STOCKTON, her guardian, Thomas Riley, Doc Willingham, Julia Willingham, a minor, E. H. Walker, her guardian ad litem, and Prarie Oil and Gas Company, a corporation, appellees.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Mr. Paul Pinson, special assistant United States attorney (Mr. D. H. Linebaugh, United States attorney, and Mr. Carter Smith, special assistant United States attorney, were with him on the brief), for appellants.

Mr. W. J. Horton (Mr. R. A. Smith was with him on the brief), for appellee, Tootie Riley.

Mr. C. H. Tully filed a brief for other appellees.

Before Sanborn, circuit judge, and Reed and Booth, district judges.

46½ Sanborn, circuit judge, delivered the opinion of the court.

On October 3, 1912, Tootie Riley, a minor, by her guardian, Julia Willingham, a minor, by her guardian, and Doc Willingham, the sole heirs at law of Emma Derrisaw Willingham, who before her marriage to Doc Willingham was Emma Derrisaw, a full-blood Creek Indian, made an oil and gas mining lease of forty acres of land in Creek County, Oklahoma, which had been allotted to Emma Derrisaw as her homestead and provided in the lease that the royalties payable by the lessee should be paid, and they have been paid to the United States Indian superintendent, Union Agency, and to his successor, Gabe E. Parker, superintendent of the Five Civilized Tribes, who, together with W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, now hold the same in trust for the benefit of the lessors. More than $15,000 are thus held and are ready for distribution, and the question in this case is when

and in what way it should be divided among the lessors. The court below held that each of them was entitled to receive one-third thereof and so decreed. From this decree the officers appeal and their counsel present numerous objections and theories inconsistent with the adjudication below.

In the first place they contend that the approval of the lease by the Secretary of the Interior did not effect the removal of the restrictions on alienation of the part of the property which the lease granted to the lessee the right to take from it, and hence that the fund must be retained until 1931 (a) because a removal of restrictions is expressly a distinct act from the approval of a lease and (b) because an oil and gas mining lease is not an alienation of land. The first argument in support of this contention is founded on the fact that in the disposition of the lands of the Indians Congress imposed more extensive restrictions upon their homesteads than upon their other allotted lands and upon sections one, two, and nine of the act of May 27, 1908. 35 Stat., 312, 315. These are the provisions of these sections material to this controversy:

Sec. 1. "All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any
47 other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

Sec. 2. "Leases of restricted lands for oil, gas, or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

Sec. 9. "That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April 26, 1931, * * * in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions."

Emma Derrisaw's homestead allotment was duly selected, allotted, and patented to her. In the year 1901 her daughter, Tootie Riley, was born. In July, 1905, Emma Derrisaw and Doc Willingham intermarried and as the result of this marriage Julia Willingham was born on February 11, 1907. In November, 1907, Emma Derrisaw Willingham died intestate. As Julia Willingham is her only issue born since March 4, 1906, the right to use and occupation of the homestead until April 26, 1931, is vested in her by the terms of section 9, subject to the termination of that right by her death before that time, or by the removal of restrictions on alienation from the land, either in whole or in part. Subject to this homestead right of Julia the title to the land, according to the laws of descent and distribution of Oklahoma, vested in Tootie Riley, Julia Willing-
48 ham, and Doc Willingham in fee in equal shares upon the decease of Emma Derrisaw Willingham. The fact that the lease was lawfully and regularly made and that it was duly approved by the Secretary is conceded.

But counsel call attention to the declaration of section nine to the effect that the homestead in cases of this class shall remain inalienable "unless restrictions against alienation thereof are removed therefrom by the Secretary of the Interior in the manner prescribed by section one hereof," and insist that the approval of the lease was ineffective to remove the restrictions on alienation from the leasehold or from the royalties collected from it because the Secretary in the approval of the lease acted under section two and not under section one of the act of May 27, 1908. They also urge that under section five of the act, 35 Stat., 313, which declares that any attempted alienation or incumbrance by deed, mortgage, contract to sell, or other instrument or method of incumbering real estate, which affects the title to land allotted to allottees of the Five Civilized Tribes, prior to the removal of restrictions therefrom, and also any lease of such restricted land made in violation of law, shall be absolutely null and void, necessarily renders the attempted removal of any restriction upon alienation by the approval of a lease by the Secretary void unless the restriction upon alienation had been first removed by a prior proceeding under section one. These arguments, however, seem too subtle and ingenious to be sound. Section one provides that the Secretary may remove the restrictions on alienation wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds as he may prescribe. Section two provides that leases of restricted lands for oil, gas, or mining purposes approved by the Secretary under rules and regulations provided by him shall be valid. Valid leases of lands valuable for their oil, gas, or mineral result in the extraction and disposition of the most valuable part of the property and necessarily remove from that part of the property all restrictions upon alienation. If they failed to remove such restrictions they would be ineffective and void. If approved under section two they necessarily remove the restrictions from the property in part under rules and regulations

provided by the Secretary and if restrictions were removed to the same extent under section one they would likewise be removed under rules and regulations provided by the Secretary. Section
49 one is indeed broader than section two and it authorizes the Secretary to remove the restrictions wholly as well as partly from the land, but as the whole is greater than any of its parts and includes them all, section one includes the power to remove the restrictions on the leaseholds and their products which the Secretary is also empowered to remove by means of his approval of leases under section two. It may be that the provision in section nine that the homestead shall remain inalienable unless the restrictions are removed under section one refers to the removal of the restrictions wholly and not in part. However this may be, the court is without doubt that it was neither the intent of Congress nor is it the effect of that provision to invalidate leases approved by the Secretary under section two, or to deprive them of the indispensable effect of valid leases, the removal of the restrictions on alienation from the leaseholds they evidence and the royalties they provide. Nor, since restrictions on alienation may be removed from leaseholds and their royalties either under section one or under section two, is it essential to the validity of the removal under either section that the same or a like removal should have been first sought and procured under the other. This construction of this act is consonant with the cardinal rules that every statute should receive a rational, sensible interpretation, that the intention of the legislative body should be ascertained and given effect if possible and that this intention must be deduced, not from a part, but from the entire statute which expresses it, because the enacting body did not express its intention by a portion, but expressed it by all of the law it passed upon the subject. On the other hand, the construction sought which would deprive oil and gas mining leases authorized by section two of the effect of the removal of restrictions upon the alienation of the leaseholds and the royalties they evidence and thus render them ineffective, flies in the face of the familiar maxim that "all the words of a law must have effect rather than that part should perish by construction." City of St. Louis *v.* Lane, 110 Mo. 254, 258, 19 S. W. 533; United States *v.* Ninety-nine Diamonds, 139 Fed. 961, 963, 72 C. C. A. 9, 11; Knox County *v.* Morton, 68 Fed. 787, 790, 15 C. C. A. 671, 675; Wrightman *v.* Boone County, 88 Fed. 435, 437, 31 C. C. A. 570, 572; Stevens *v.* Nave-McCord Mercantile Co., 150 Fed. 71, 75, 80 C. C. A., 25, 29.

It is next said that the lease did not constitute an alienation of any part of the land and that consequently its approval by the
50 Secretary did not effect a removal of any restrictions on alienation. In support of this position counsel cite Duff v. Keaton, 33 Okla. 92, wherein the Supreme Court of Oklahoma held that an oil and gas lease was neither a conveyance nor a sale of a minor's land within the meaning of section 5314, Comp. Laws of Oklahoma, 1909, so that it was not necessary for his guardian in order to make such

a lease on his behalf to follow the procedure there prescribed to enable him to make a sale or conveyance of the land. But that court was careful to add: "This conclusion does not militate against the rule announced in Eldred v. Okmulgee Loan & Trust Co., 22 Okla., 742; 98 Pac., 929. There it was held that a lease was an alienation within the terms of an act of Congress approved April 21, 1904, 33 Stat. 204, Chap. 1402, which reads: 'And all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, removed,' wherein this court said: 'Hence we conclude that a lease conveys a leasehold estate; is an alienation by deed; is an alienation within the intent and meaning of the act of April 21, 1904, supra, upon which species of alienation restrictions by that act were removed.'" 33 Okla., 103. They cite Kolachmy v. Galbreath, 26 Okla. 772, which holds that a grant by lease of oil and gas when it is in the ground is a grant not of the oil and gas in the ground, but of such part of the oil and gas as the lessee finds and reduces to possession and that as such a lease does not convey a corporeal hereditament it will not sustain an action of ejectment. And such is also the holding by this court. Priddy v. Thompson, 204 Fed. 955, 960, 123 C. C. A. 277, 282. They cite Traer v. Fowler, 144 Fed. 810; State v. Evans, 99 Min. 220, and other case of like character, to the general rule that coal, iron, oil, gas, and other minerals derived from the ordinary and reasonable operation of opened mines constitute the rents and profits and not the body of the property, and belong to the owners of the former and not to the owners of the latter. But these decisions do not rule, nor did the judges in rendering them consider, the question here at issue. That question is, Does an oil and gas mining lease of a restricted homestead made and approved under section two of the act of May 27, 1908, constitute an alienation thereof wholly or in part within the meaning of that act? Section one of that act declares that all homesteads of the class here under consideration "shall not be subject to alienation, contract to sell, power of attorney, or any
51 other incumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions wholly or in part," etc. Oil and gas in the ground are a part of the land and in this case they were the most valuable part of the land of the lessors. While a lease of such land granting the exclusive right to find and extract all the oil and gas therein conveys only that part of the oil and gas which the lessee finds and reduces to possession and not all the fugacious oil and gas in the land, it nevertheless grants the right and gives the power to the lessee to extract and apply to his own use the most valuable part of the land of the lessors, their oil and gas in their ground. And when, as here, the execution of such a lease is followed by the discovery and extraction of valuable deposits of oil and gas thereunder it not only conveys an incorporeal hereditament, but it effects the removal from the lessors of the title to the most valuable part of their land, for oil and gas

in the ground is a part of the land of the owners of the latter. Such a lease becomes an alienation of that part of the land of the lessors which the lessee takes from it, converts into personal property and appropriates to his own use. That it was not the intent of the Members of Congress that such a lease should fall without the alienation they forbade is evident from the fact that such a result would have left property of incapable Indians of great value free from restrictions on alienation and also from the fact that they thought it necessary to enact section two in order to provide a way by which such leases might, with the approval of the Secretary of the Interior, be relieved from the restrictions on alienation which they clearly believed had been imposed upon them by section one. And the conclusion is that a lease of a restricted homestead for oil, gas, or other mining purposes under section two of the act of May 27, 1908, is an alienation of that part of the land constituting the homestead which the lease permits the lessee to take from it by the discovery and removal thereunder of the oil, gas, or other mineral therein. Moore v. Sawyer, 167 Fed. 826, 835; Eldred v. Okmulgee Loan & Trust Co., 22 Okla. 742, 745, 746; Sharp v. Lancaster County, 100 Pac. 578, 579; Truskett v. Closser, 198 Fed. 835, 836, 838, 117 C. C. A. 477, 478, 480; Beck v. Flournoy Live-Stock & Real Estate Co., 65 Fed. 30, 31, 34, 35, 12 C. C. A. 497, 498, 501, 502.

Another position of counsel for the appellants is that the approval of the oil and gas mining lease and the consequent removal of the restrictions on alienation from that part of the homestead
52 which consisted of the oil and gas in the ground which the lessee has taken and may take from the land under the lease did not effect any change in the character or in the termination of any estate inherited by Julia Willingham and that she still retained thereafter the same interest and estate in the land and in the homestead which she had previously held. The only question in this case is the extent of the respective interests of the three lessors in the fund which has been accumulated in royalties out of the oil and gas extracted under the lease. From that oil and gas and from the part of the land which the lessee took from the lessors in order to obtain them the restrictions upon alienation were removed on October 25, 1912, when the Secretary approved the lease. It is immaterial to the determination of the interests of these lessors in this fund what estates or interests they retain in that part of the land constituting the homestead not covered by the lease, and it is also immaterial whether or not the restrictions on alienation have been removed from that part of the land. Those questions are, therefore, here dismissed.

Nor is it fatal to the decree of the court below that each of these three lessors is entitled to one-third of the fund in controversy that the estate or interest of Julia Willingham in the part of the land which the lessors granted to the lessee remained the same after the removal of the restrictions as before. When these restrictions were removed on October 25, 1912, the land was agricultural or grazing land. No oil or gas wells had been drilled and no mines had been

opened. Julia Willingham had the right during her life until April 26, 1931, to the use and occupation of the land, and she, Tootie Riley, and Doc Willingham each owned one undivided one-third of the land in fee subject to that right. As an estate for life is the largest estate that right could possibly be, let us concede without deciding that the title of the three heirs was subject to an estate for life in Julia Willingham and that her estates and interests in the lands were not terminated or changed by the removal of the restrictions on the alienation of the part of the land leased. As when the restrictions were removed there were no mines opened on the land she, as owner of an estate for life, had no right to open any and no right by virtue of her life estate to the royalties or rents and profits from any oil or gas that might be obtained from mines subsequently opened. The title to the oil and gas in the ground and to the rents, profits, and royalties that might in the future be obtained from mines that
53 were subsequently opened was in the three owners of the fee. Lanyon Zinc Co. v. Freeman, 75 Pac., 995; Marshall v. Mellon, 179 Pa St., 371, 36 Atl., 201; Williamson v. Jones, 27 S. E. (W. V.), 411; Hook v. Garfield Coal Co., 83 N. W., 963; Oolagah Coal Co. v. McCaleb, 68 Fed., 86; Ohio Oil Co. v. Daughetee, 240 Ill., 361, 88 N. E., 818. If, therefore, as counsel argue, the removal of the restrictions on alienation from the part of the land subject to the lease, neither terminated nor changed the character of the estates of the three parties interested in the land, Julia Willingham, who had no right to nor interest in the oil or gas in the lands or in their future proceeds, before the removal of the restrictions by reason of her homestead right, had none thereafter by virtue of that right, and those proceeds were rightly decreed to the three owners of the fee share and share alike.

Moreover, if this conclusion were erroneous, a careful study of section nine has satisfied that the homestead right of Julia Willingham in reality never rose to the dignity of an estate for life in any part of the land allotted to Emma Derrisaw. The purpose and effect of the act of July 28, 1908, was not to create estates, but to limit the extent of and to remove restrictions upon alienation. United States v. Knight, 206 Fed., 145. This homestead was originally vested in Emma Derrisaw, the allottee, and remained inalienable after the death of that allottee for the use and support of her issue. Section nine of the act of May 27, 1908, which limited the duration of the restrictions on its alienation and the time during which Julia Willingham had the right to it for her use and support, provided that neither should continue beyond April 26, 1931, in any event, and that both might be terminated at any time before that date, either by the death of Julia or by the removal by the Secretary of the restrictions on its alienation. The contention of counsel that the clause "unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof," in the provision in section nine that if the allottee of one-half or more Indian blood shall die leaving issue surviving born since March

4, 1906, "the homestead of such deceased allottee shall remain inalienable unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof for the use and support of such issue during their life and lives until April 26, 1931," limits the word inalienable only and does not limit the duration of the right of such issue to the home-
54 stead for their use and support has received consideration and meditation, but it has not proved persuasive. The subject of the act, which was restrictions on alienation, the purpose of its enactment, which was to limit and remove them, and the plain terms of this provision convince that its true construction is that restrictions on the alienation of and the right of the issue to the homestead for their use and support terminated at the same time whether that termination is wrought by the removal of the restrictions on alienation by the Secretary, by the death of the issue before May 26, 1931, or by the arrival of that date. And the result is that even if Julia Willingham ever had any homestead right for her use and support in the part of the land of the lessors granted by the lease it did not constitute an estate for life, it did not rise higher than an estate for years defeasible during its term by her death or by the removal of the restrictions on its alienation by the Secretary; and as the Secretary removed all restrictions on the alienation of that part of the land by his approval of the lease on October 23, 1912, her homestead right to it for her use and support, if she ever had any, then terminated. And the conclusion is that because Julia Willingham never had, by virtue of her homestead right, any estate for life in or right to the part of the land here in controversy that was leased or to the proceeds thereof for her use and support and because even if she had any estate or interest therein it was terminated on October 23, 1912, when the restrictions on its alienation were removed, she is entitled to no larger share of the royalties derived from the lease than is each of the other lessors.

In opposition to this result the decision of the Supreme Court of Oklahoma in Barnes v. Keys, 36 Okla., 6; Wilson v. Youst, 43 W. V., 826, 28 S. E., 781, 787; Ammons v. Ammons, 50 W. V., 390, 40 S. E., 490, 494; Eakin v. Hawkins, 52 W. V., 124, 43 S. E., 211, 212; Stewart v. Tennant, 52 W. V., 559, 44 S. E., 223, 229, and Blakley v. Marshall, 34 Atl., 564, have been cited. The opinions in these cases and in Higgins Oil & Fuel Co. v. Snow, 113 Fed., 433, 437, 439, 51 C. C. A., 267, 271, 273, and Raynolds v. Hanna, 55 Fed., 783, have been examined and thoughtfully considered. They rest on the proposition that although the owner of a life-estate may not lawfully open mines and extract and appropriate to his own use minerals from unopened land, yet, where the owner of the life-estate in mineral land and the remainder men join in a mining lease for the purpose of opening and operating mines in the land, the life tenant is entitled to re-
55 ceive a part of the royalties proportionate to the value of his life-estate. The facts in these cases, however, differ so radically from those of the case at bar that the decisions in them not only

fail to rule this case, but they fail to persuade that the conclusion by the court below and now by this court is erroneous. For example, Barnes v. Keys, was a partition suit between the owners of the life-estate in mineral land and the remainder men. The life expectancy of the estate was thirty-eight years. The trial court had heard, considered, and found the respective proportional values of the life-estate and the estate of the remainder men in the land which they had jointly leased for mining purposes. It had found that the value of the life-estate was 80 per cent of the entire value of the property and the value of the estate of the remainder men only 20 per cent of that value, and upon the basis of that finding the Supreme Court of Oklahoma held that the owners of the life-estate were entitled to receive interest on the royalties at six per cent per annum from the times when they were respectively produced until the expiration of the life-estate. In the case at bar there is no life-estate. Even if there was a defeasible estate for years in the part of the land leased that was terminated by the removal of the restrictions on the alienation of that part when the lease was approved and before the mine was opened or any of the royalties were collected. The court below did not find in this case that the homestead right of Julia Willingham in the part of the land leased or in the whole body of the land ever had any value, but it adjudged that she was entitled to no part of the royalties on account of her homestead right and that was in effect a finding that her homestead right in the part of the land leased was of no value, and there is no evidence in the record that it had any value. Because the legal proposition on which the cases cited by counsel for the appellants relative to this subject are founded is inapplicable to the facts of this case and because the facts in those cases are not analogous to the facts in the case at bar, the opinions in those cases fail to satisfy that the conclusion of the court below that Julia Willingham was entitled to no part of or interest in the royalties under the lease was not just and equitable.

Finally counsel for the appellants, after exhaustively discussing the rights and interests of the lessors on the theory that they are measured by the provisions of the act of May 27, 1908, propose near the end of their brief a new theory, which they concede that they did not present to the court below, to the effect that conceivable
56 estates differing from those resulting from the act of 1908, were vested in Tootie Riley and Julia Willingham by section seven of the original Creek agreement, 31 Stat. 861, or by section sixteen of the supplemental Creek agreement, which took the place of section seven, 32 Stat. 500, which estates could not constitutionally be and were not devested or modified by the act of 1908, by virtue of which conceivable estates Tootie Riley and Julia Willingham are each entitled to one-half of the royalties under the lease as joint owners of the fee to the land from which they are derived, or that they are entitled as joint life tenants to the interest on the royalties. Section seven of the original Creek agreement provided that the homestead of each citizen should be inalienable for twenty-one years

and should remain after the death of the allottee for the use and support of children born to him after the ratification thereof, which was made on May 25, 1901, and Tootie Riley and Julia Willingham were born after that date. Section sixteen of the supplemental Creek agreement, 32 Stat. 500, declares that such homestead shall be and remain non-taxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor and that it shall remain after the death of the allottee for the use and support of children born to him after May 25, 1901. The arguments of counsel in support of their new theory have not proved convincing. They are ingenious and subtle. But they do not tend to lead to clarity and certainty, but to confusion and doubt. Suffice it to say upon this subject, that in view of the opinion of the Supreme Court in Tiger v. Western Development Company, 221 U. S. 286, 304, 306, 307, 308, 309, 311, 313, and 316, and of the later decisions which have quoted and followed that opinion, our conclusion is that the provisions of the act of May 27, 1908, relative to the rights and interests of these lessors so far as they are in any respect repugnant to and inconsistent with those of the original or the supplemental Creek agreement relative to the same subject, repealed to the extent of that repugnancy and became substitutes for those earlier provisions, that they did not deprive any of the parties in interest here of any of their vested estates or constitutional rights and that the rights and interests of these parties are governed and measured by the provisions of the act of May 27, 1908.

Let the decree below be affirmed.

Filed May 14, 1917.

57 Reed, district judge, dissenting in part.

The restrictions upon alienation of the oil and gas deposits in the homestead of Emma Derrisaw, a full-blood citizen of the Creek Nation, the allottee of the land in question, if removed at all other than by her death, were removed by the approval of the oil and gas mining lease of October 3, 1912, by the Secretary of the Interior on November 9, 1912. Admitting for the present that the Secretary of the Interior, in view of sec. 6 of the act of Congress approved May 27, 1908 (35 Stat., chap. 199, p. 315), was thereafter authorized to approve such leases to effect the removal of such restrictions, the question is: To what share, if any, of the royalties in the custody of the superintendent of the disbursing agency of the Five Civilized Tribes arising from the lease of such premises is the minor defendant, Julia Willingham, now entitled, she being the only child of Emma Derrisaw, deceased, intestate, born since March 4, 1906, and restrictions upon the alienation of her homestead not having been removed prior to her death?

It seems to be conceded that sec. 9 of the act of May 27, 1908, controls the determination of this question. That section in full reads in this way:

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws
of descent and distribution of the State of Oklahoma, free
58 from all restrictions: Provided further, That the provisions
of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

Other provisions of the act of May 27, 1908, that may bear upon this question are: Sec. 2 as set forth in the majority opinion further provides: "That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors * * * shall be subject to the foregoing provisions, * * *."

"Sec. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to the removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void."

"Sec. 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma." And further provisions of this section empower the Secretary of the Interior under rules and regulations prescribed by him, to exercise supervision and control over all guardians of minors to the end that their estates in restricted and other lands shall be preserved and their property protected for the benefit of said minors, and the probate courts may in their discretion appoint any representative of the Secretary as guardian for such minors, without fee or charge.

Upon the death of Emma Derrisaw intestate (the restrictions against alienation of the homestead not having been previously removed, and issue born to her since March 4, 1906, surviving her) sec. 9 of the act conferred upon her minor child, Julia Willingham, who was born since March 4, 1906, the sole right to the use of the homestead for her support until April 26, 1931, unless she should die prior to that date, when her right would cease and the land then descend to the heirs of her mother, Emma Derrisaw Willingham. The minor Julia is still living, or was at the time of the hearing in the court below, and that court held, as I read its opinion, that upon the death of Julia's mother intestate, this minor became en-
59 titled only to such use of the land as she might make of it, with the restrictions against its alienation still existing; that the use contemplated by the statute did not permit the lease of the land for oil and gas mining purposes, because that would amount to a disposition of that part of the corpus of the property and prevent its going to the heirs of the allottee at the expiration of the minor's term as granted by sec. 9, and would in effect be a conversion for the benefit of the minor of that part of this homestead property; that the minor could not thererfore rightly be allowed anything from the proceeds arising from the oil and gas mining lease for her support during the term granted by that section. I am unable to concur in that part of the decree, for under sec. 9, upon the death of Emma Derrisaw intestate, all restrictions against the alienation of this homestead were removed and it then descended to her heirs under the statute of Oklahoma, subject to the right of her heirs born since March 4, 1906, the child, Julia, being the only heir so born. The restrictions against alienation it is true had not, previous to her death, been removed in the manner provided by sec. 1 of the act; but under sec. 9 all restrictions upon her lands, including this homestead, were removed by her death. The removal of the restrictions is of course for the purpose alone of permitting alienation of the land. United States v. Knight, 206 Fed. 145; and unless alienation is in fact made the rights of parties in the land, other than the right of alienation, it seems to me is not affected. But if it be conceded that the removal alone of the restrictions by the Secretary of the Interior can deprive the minor Julia of her right to the use of this homestead for the purpose for which it was granted to her, clearly she could not be deprived of such right until the restrictions are so removed, which in this case was not until November 9, 1912, four years after the death of her mother and after her right to the use thereof had fully vested in her. The clause of sec. 9, which reads, "unless restrictions against alienation are removed by the Secretary of the Interior in the manner provided in section one hereof," has reference to and limits the word "alienation" and does not affect the right in or to the land other than the right to alienate or incumber it. Emma Derrisaw died intestate in November, 1908, seized in fee of this homestead; the restrictions upon its alienation not having been previously removed, but were removed under sec. 9 of the act, by

her death. No alienation of the land or of its oil and gas deposits or will of Emma Derrisaw having then been made, its descent
60 was then cast upon her legal heirs, subject however, to the rights of the child Julia under sec. 9, who was born since March 4, 1906, to its use for her support until April 26, 1931, or until her death, should that occur before that date. I am unable to bring myself to believe that the right of Julia to the use of this entire homestead property, if necessary for her support, which vested in her on the death of her mother in November, 1908, could be devested by the approval of the Secretary of the Interior four years later. Jones v. Meehan, 175 U. S. 1, 32. Conceding for the present that under sec. 6 of the act of May 27, 1908, the Secretary of the Interior was authorized to approve the lease after the death of Emma Derrisaw (secs. 11, 12, and 13 of art. 7 of the constitution of Oklahoma and secs. 3330, 3335, 6447, 6532, 6554, and 6569 of the Revised Laws of Oklahoma (1910), which confer upon the proper county court of the State of Oklahoma jurisdiction of the persons and property of minors in that State), it seems to me clear that the right of the minor Julia to this entire homestead property, or the income from or proceeds of this homestead for her support during the term granted by sec. 9 is not and cannot rightly be barred by the approval of the lease by the Secretary of the Interior in November, 1912. Jones v. Meehan, 175 U. S. 1, 32, above. If this be not true, then if the homestead is not susceptible of use for agricultural or similar purposes, the minor would be deprived of all means of support from its use during the term for which it was granted to her. See Meehan v. Ruth Oil Company, et al., 231 Fed. 845.

It seems to me that the royalties received under this oil and gas mining lease deposited with the disbursing agency of the Five Civilized Tribes are rent and income from that part of this homestead which may be rightly used for the support of this minor, and only such of the proceeds or income thereof as remains after a reasonable support has been furnished to the minor therefrom during the term of her right to the use thereof can rightly be distributed to the heirs, including this minor, of Emma Derrisaw. The Congress in enacting sec. 9 of this act was not concerning itself with any technical definition or meaning of the estate or interest in the homestead right to which the children of allottees of lands in the Creek Nation born since March 4, 1906, would be entitled under that section, for it grants to such children the right to the use of such estate, whatever the legal definition of that right may be, for their support during the term granted. In Jones v. Meehan, above, it is said, in construing any treaty between the United States and an Indian
61 tribe, it must always be borne in mind that the treaty must be construed not according to the technical meaning of its words to learned lawyers but in the sense in which they would naturally be understood by the Indians. Citiing Worcester v. Georgia, 6 Pet. 515, 582; Choctaw Nation v. United States, 119 U. S. 1, 27, 28; and the same rule should apply in construing the acts of

Congress, since the Government has adopted that method of dealing with Indians instead of by treaty.

That the right granted is not a life estate may be admitted; but that it is a right to use it for a term of years, subject to the termination of that right by her own death, or the death testate of her mother, prior to the expiration of the term granted, can not be doubted. The oil and gas deposits in this land are of a migratory character, and probably its principal value, and may be exhausted by the operation of oil and gas wells upon land adjacent or near thereto or dissipated from other causes long before the year 1931; and thus the allottee, or upon her death her heirs, deprived of the principal value and source of revenue from this land. Mallen v. Ruth Oil Co. et al., 231 Fed., 845, 849, and Barnes v. Keyes, 127 Pac., 261 (Okla.); see also as bearing upon this question: Reynolds v. Hanna, 55 Fed., 788, 801, and cases there cited; Lacey v. Newcomb, 95 Iowa, 287, 294, and its citations; State v. Evans, 99 Minn., 220 (9 Ann. Cas., 520 and note); Appeal of Bedford, 17 Atl., 538 (Pa.). It was therefore to the interest of all the heirs of the allottee, Emma Derrisaw, that the oil and gas deposits in this homestead should be disposed of at an opportune time and the proceeds arising therefrom invested or otherwise conserved for the support of the minor Julia during the term for which she is entitled to the use thereof and the remainder for the benefit of all the heirs after the expiration of such term.

The fact that the oil wells had not been drilled prior to the death of Emma Derrisaw is quite immaterial, for by the lease of the adult and the minor heirs by their guardian, under authority of the Probate Court, it was intended that the oil and gas deposits should be removed from the land, and the lease authorized the sinking of requisite wells in order that such deposits might be removed and the proceeds conserved as before stated.

As to the minor defendant, Tootie Riley, and the defendant, Doc Willingham, it appears that Tootie Riley was born prior to March 4, 1906, but whether before or after September 1, 1902, does not definitely appear; but whether before or after that date she
62 was entitled to enrollment as a member of the Creek Nation and to participate in the allotment and distribution of its lands and funds under the Acts of April 26, 1906 (34 Stat., c. 1876, p. 148), and June 21, 1906 (34 Stat., c. 3504, pp. 325, 341), amending the Act of 1902, as held in the case of Gritts v. Secretary of the Interior, 224 U. S., 640. Doc Willingham married Emma Derrisaw in July, 1905, and the minor, Julia, is the issue of that marriage, born February 11, 1907. Neither the minor, Tootie Riley, nor Doc Willingham is, therefore, entitled to anything under the Act of May 27, 1908, except as they may inherit from the allottee, Emma Derrisaw, and as such heirs their rights are subject to the right of the minor, Julia Willingham, in this homestead; and it seems to me that the purpose of sec. 9 of that act is to enable minor children born since March 4, 1906 to have the use of the homestead of their parents dying

intestate for the term granted by that section, and it should be given a liberal construction to effectuate that purpose.

Whether or not the provisions of sec. 6 of the act of May 27, 1908, which confers upon the probate courts of Oklahoma jurisdiction of the persons and property of these minors, deprives the Secretary of the Interior of the right to remove restrictions against alienation of the property of such minors after their rights become vested, is a question not raised in the trial court, has not been discussed here, and need not be considered.

The record fails to show what amount of the royalties arising from the lease in question will be sufficient for the reasonable support of the minor during the term for which she is entitled to such use (that being the purpose for which she is entitled to its use), the cause should be remanded to the District Court to ascertain the reasonable value of such support and to provide for its payment to her out of the royalties now in the custody of the superintendent or disbursing agency of the Five Civilized Tribes or that it may hereafter receive for such royalties before the remainder of such fund is distributed to the legal heirs of Emma Derrisaw.

Filed May 14, 1917.

68 *Decree.*

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1917. Monday, May 14, 1917.

GABE E. PARKER, SUPERINTENDENT FOR THE FIVE CIVILIZED TRIBES, successor to Dana H. Kelsey, as United States Indian superintendent, and W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, general disbursing agent, Union Agency, appellants,

vs.

TOOTIE RILEY, A MINOR, U. C. STOCKTON, HER GUARDIAN, Thomas Riley, Doc Willingham, Julia Willingham, a minor, E. H. Walker, her guardian, and the Prairie Oil and Gas Company, a corporation.

No. 4520.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby, affirmed without costs to either party in this court.

May 14, 1917.

64 *Petition of appellants for appeal to Supreme Court, U. S.*

Now come the appellants, Gabe E. Parker, as superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, by their solicitor of record, W. P. McGinnis, United States district attorney for the Eastern District of Oklahoma, who appears for and on behalf of said appellants at the request of the Honorable Franklin K. Lane, Secretary of the Interior of the United States, and by direction of the Honorable Thomas W. Gregory, Attorney General of the United States, and represent and show to the court that the appellants feel themselves aggrieved by the decree and judgment of this court made and entered in the above-entitled cause on the 14th day of May, 1917, wherein and whereby this honorable court affirmed the judgment of the District Court of the United States for the Eastern District of Oklahoma, from which judgment the appellants had prosecuted their appeal to this honorable court; wherefore appellants do hereby pray an appeal from this decree and judgment of this honorable court to the Supreme Court of the United States for the reasons and upon the grounds specified in the assignment of errors filed herewith; and appellants pray that a transcript of the record and proceedings upon which said decree and judgment is based, duly authenticated, may be sent to the Supreme Court of the United States by the clerk of this court. And appellants further pray that this honorable court enter proper order adjudging the security to be required of the appellants, if any, and that an order directing the clerk to send up the record in this case and perfect the appeal herein be duly made.

W. P. McGinnis,
United States Attorney for the Eastern District of Oklahoma, Solicitor for Appellants.

65 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 8, 1917.

Assignment of errors on appeal to Supreme Court, U. S.

Come now the appellants, Gabe E. Parker, as superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, and respectfully assert and show to this honorable court that in the decree and judgment of this honorable court, entered in the above-entitled cause on the 14th day of May, 1917, wherein and whereby was affirmed the judgment of the United States District Court for the Eastern District of Oklahoma, the following errors were committed by this honorable court to the injury and prejudice of the appellants, to wit:

1st. The court erred in ordering, adjudging, and decreeing that the appellants, as custodians of the funds arising from an oil and gas lease upon the southwest quarter of southeast quarter of section thirty-two (32), township eighteen (18) north, range seven (7), east of the Indian base and meridian, in Creek County, State of Oklahoma, being the homestead of Emma Derrisaw, a full-blood Creek Indian, deceased, pay to appellees, Doc Willingham, U. C. Stockton, as guardian of Tootie Riley, a minor, and E. H. Walker, as guardian of Julia Willingham, a minor, each one-third of the royalties now in their hands, or hereafter to accrue, by reason of the production of oil and gas upon the said lease.

66 2nd. The court erred in finding, concluding, and holding that the leasing of said land for oil and gas production, with the approval of the Secretary of the Interior, was an alienation of land, within the meaning of the acts of Congress imposing restrictions upon the alienation of lands, and particularly of that act providing that if any member of the Five Civilized Tribes of Indians, of one-half or more Indian blood, shall die leaving issue surviving born since March 4, 1906, the homestead of such deceased allotte shall remain inalienable unless the restrictions against alienation are removed therefrom by the Secretary of the Interior, in the manner provided by law, for the use and support of such issue during their life or lives until April 26, 1931.

3rd. The court erred in not finding, concluding, holding, and decreeing that the said appellants, Gabe E. Parker, as superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, should pay to the defendant, E. H. Walker, as guardian of Julia Willingham, the minor heir of the deceased full-blood, Emma Derrisaw, born since March 4, 1906, either the entire amount of the accumulated royalties now in the hands of appellants, or hereafter to accrue, or such portion thereof as would compensate the said minor for the use of said homestead as provided by law and as hereinafter appears.

4th. The court erred in not finding, concluding, holding, and decreeing, if the leasing of the homestead allotment of Emma Derrisaw, deceased, for oil and gas production was an alienation of said lands within the meaning of the acts of Congress imposing restrictions and limitations upon the same, that the appellants should pay to the guardian of Julia Willingham, in addition to her distributive

67 share of the property as an heir of Emma Derrisaw, an additional sum equivalent to the interest upon the entire accumulated royalties accruing from the homestead of Emma Derrisaw during the life of Julia Willingham, or until April 26, 1931, when said fund should be distributed to the heirs of the said Emma Derrisaw, deceased.

5th. The court erred in not adjudging the minor, Tootie Riley, and the minor, Julia Willingham, to be entitled to receive from ap-

pellants either the total amount of the accrued and accruing royalties received from their mother, Emma Derrisaw's homestead, by virtue of the oil and gas production therefrom, and by virtue of the act of Congress known as the original Creek agreement, section 7 of which provides that the homestead of any deceased Creek allottee should remain inalienable for the use and support of children born to such allottee after May 25, 1901, each of said minor children having been born to Emma Derrisaw subsequent to said date.

6th. The court erred in holding, adjudging, and decreeing that the vested interest of Tootie Riley, in and to the homestead of her mother, Emma Derrisaw, by virtue of section 7 of the original Creek agreement, could be divested and was divested or modified by the act of May 27, 1908, and that, by virtue of said latter act, the said Tootie Riley thereafter was entitled to receive a share in the rents and royalties arising from said homestead no greater than the general heirs of the mother received.

7th. The court erred in not adjudging and decreeing that the minors, Tootie Riley and Julia Willingham, or either of them, were entitled to a greater share of the estate than Doc Willingham, the husband of the deceased, Emma Derrisaw, in any event by reason of the provisions of law declaring the homestead property involved herein to be especially applicable to the use and support of the said minors, or of the minor, Julia Willingham.

68 8th. The court erred in affirming the decree of the District Court of the United States for the Eastern District of Oklahoma in favor of appellees and against these appellants, and in not making, by its decree herein rendered, provision for the use and support of the minor, Julia Willingham, and the minor, Tootie Riley, or either of them, in addition to an equal share in the distribution of the royalties arising from the homestead of their deceased mother, Emma Derrisaw, a full-blood Creek Indian.

Wherefore, these appellants pray that such judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit, made and entered in this cause on the 14th day of May, 1917, and the decree of the United States District Court for the Eastern District of Oklahoma, made and entered on the 18th day of November, 1914, be reversed and that the Supreme Court of the United States of America render such proper decree on the record in this cause as shall conform to the facts disclosed by the record and the law applicable thereto.

W. P. McGinnis,
United States Attorney for the Eastern District of Oklahoma, Solicitor for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 8, 1917.

Order allowing appeal to Supreme Court, U. S.

Now, on this 10th day of August, A. D. 1917, it is

Ordered that the petition of appellants, Gabe E. Parker, as superintendent for the Five Civilized Tribes, successor to Dana

H. Kelsey, as United States Indian superintendent, Union
69 Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, for an appeal to the Supreme Court of the United States be, and is hereby, allowed; and it appearing that the appeal is being prosecuted by the United States of America for and on behalf of said officers, it is further ordered that the said appeal be without bond.

WALTER I. SMITH,
United States Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 11, 1917.

70 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the appellees, Tootie Riley, a minor, by U. C. Stockton, her guardian, Thomas Riley, Doc Willingham, Julia Willingham, a minor, E. H. Walker, her guardian ad litem, and Prairie Oil and Gas Company, a corporation, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Gabe E. Parker, as superintendent for the Five Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special disbursing agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter I. Smith, United States circuit judge in and for the Eighth Circuit, this 10th day of August, A. D. 1917.

WALTER I. SMITH,
United States Circuit Judge, Eighth Circuit.

(Indorsed:) Original. No. 4520.
Gabe E. Parker et al., appellants, vs. Tootie Riley et al. Citation on appeal to Supreme Court, U. S.

71 Service of the foregoing citation by delivery of a copy thereof is hereby acknowledged this the 13th day of August, 1917.

W. J. HORTON,
R. A. SMITH,
Solicitors of Record for Appellees, Tootie Riley, by U. C. Stockton, Her Guardian, and Thomas Riley.

72 The undersigned, solicitor of record for the Prairie Oil & Gas Company, a corporation, hereby acknowledges service of citation issued out of the Circuit Court of Appeals for the Eighth Circuit, in cause No. 4520, Gabe E. Parker, as superintendent for the Five Civilized Tribes et al., appellants, vs. Tootie Riley, a minor, et al., appellees.

W. S. FITZPATRICK,
Per T. J. F.
Solicitor of Record for the Prairie Oil & Gas Company, a Corporation.

73 GABE E. PARKER, AS SUPERINTENDENT FOR THE FIVE Civilized Tribes, successor to Dana H. Kelsey, as United States Indian superintendent, Union Agency, and W. M. Baker, as cashier and special agent for the Five Civilized Tribes, successor to W. M. Baker, as general disbursing agent, Union Agency,
TOOTIE RILEY, A MINOR, BY U. C. STOCKTON, HER guardian, Thomas Riley, Doc Willingham, Julia Willingham, a minor, E. H. Walker, her guardian ad litem, and Prairie Oil and Gas Company, a corporation. } No. 4520.

I hereby accept service of citation on appeal on this the 13th day of August, 1917.

C. H. TULLY,
Attorney for Doc Willingham, Julia Willingham, a Minor, E. H. Walker, Her Guardian Ad Litem.

(Indorsed:) No. 4520. Gabe E. Parker, et al., v. Tootie Riley, et al. Citation on appeal to Supreme Court, U. S., and acceptances of service. Filed Aug. 14, 1917. E. E. Koch, clerk.

74 *Clerk's certificate.*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed, and certified by the clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the act of Congress, approved February 13, 1911, and full, true, and complete copies of all the pleadings, record, entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals

wherein Gabe E. Parker, as superintendent for the Five Civilized Tribes, etc., et al., were appellants, and Tootie Riley, a minor, etc., et al., were appellees, No. 4520, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acceptances of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the twenty-fourth day of July, A. D. 1917, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the Eastern District of Oklahoma.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this seventeenth day of August, A. D. 1917.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsed on cover:) File No. 26108. U. S. Circuit Court Appeals, 8th Circuit. Term No. 641. Gabe E. Parker, as superintendent for the Five Civilized Tribes et al., appellants, vs. Tootie Riley, a minor, by U. C. Stockton, her guardian, et al. Filed August 21st, 1917. File No. 26108.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

GABE E. PARKER, SUPERINTENDENT FOR the Five Civilized Tribes, et al., appellants,
v.
TOOTIE RILEY, A MINOR, BY U. C. STOCKTON, her guardian, et al.
No. 254.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

STATEMENT.

The appeal in this case (R. 52) is by the superintendent and disbursing agent for the Five Civilized Tribes from a decree of the Circuit Court of Appeals for the Eight Circuit (R. 51) affirming a decree of the District Court for the Eastern District of Oklahoma (R. 26) which directed the appellants to distribute equally among the heirs of Emma Derrisaw, a deceased full-blood Creek Indian allottee, the proceeds of an oil and gas lease of her homestead allotment.

Opinions: D. C. (R. 22), 218 Fed. 391; C. C. A. (R. 37), 243 Fed. 42; dissenting opinion (R. 46), 243 Fed. 51.

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The facts were stipulated. Emma Derrisaw, a full-blood Creek Indian allottee, died in November, 1908. She left as her heirs two daughters, Tootie Riley and Julia Willingham, and a husband, Doc Willingham. Tootie Riley was born about the year 1902 and Julia Willingham was born February 11, 1907. On October 13, 1912, all the heirs joined in executing an oil and gas lease for that portion of the allotment of Emma Derrisaw which embraced the homestead of 40 acres, the two children who are minors being represented by their guardians. The lease was in accordance with the rules and regulations of the Secretary of the Interior and was approved by him. The fund in controversy consists of royalties to the amount of over $15,000 received and held by the appellants and future royalties to accrue under the terms of the lease. R. 13–14.

The appellants have no interest in the controversy except to hold and pay over the money as required by law and the regulations of the Secretary of the Interior, and they allege that the entire proceeds of the lease belongs to the daughter, Julia Willingham, because she was born after March 4, 1906. R. 12.

The question for decision depends upon the true construction of the act of May 27, 1908, 35 Stat. 312. The pertinent provisions, consisting of a portion of section 1 and the whole of sections 2 and 9, are as follows:

> That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civi-

lized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full bloods, and enrolled mixed bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act.

SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not

been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further*, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee

shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

Assignment of Errors.

The various errors alleged in the assignment (R. 53) may be reduced to two, viz:

1. Error in ruling that the proceeds of the oil and gas lease on the Creek homestead allotment of Emma Derrisaw, deceased, belong to her heirs in equal parts.

2. Error in not ruling that the proceeds of said oil and gas lease belong entirely to Julia Willingham, the child born after March 4, 1906.

Propositions.

1. The life interest of Julia in her mother's homestead allotment is exclusive and not subject to termination by removal of restrictions on alienation.

2. The right of Julia to receive the oil and gas royalties is not governed by the common-law rule relating to life tenants and remaindermen but results from the purpose of Congress as expressed in the act of 1908.

3. The common-law rule relating to the respective rights of life tenants and remaindermen in the royalties derived from an oil and gas lease executed by both after inception of the life estate would give to Julia the income from the fund during her life.

I.

As the deceased allottee was a full-blood Creek Indian, and as Julia Willingham, one of her surviving children, was born after March 4, 1906, and before May 27, 1908, the rights of this child in the homestead of the allottee depend primarily on the language of the second proviso of section 9 of the act of May 27, 1908, 35 Stat. 315, which declares:

> That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in sec-

> tion one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.

The main purpose of this provision is clear enough. It was to set apart the homestead of a deceased allottee "for the use and support" of any surviving child or children born since March 4, 1906, "during their life or lives." The motive for this is certain. It was to provide for Indian children born to allotted citizens after the date when the right to receive an allotment of tribal land no longer existed. That date had been fixed as March 4, 1906, by the act of April 26, 1906, 34 Stat. 137, § 2. In previous legislation similar dates had been fixed for the closing of allotments to Creek Indian children, and similar provisions were made for children born thereafter. Thus the act of March 1, 1901, 31 Stat. 861, known as the Original Creek Agreement, closed the allotment roll to citizens living April 1, 1899, and to the children of enrolled citizens born thereafter and living July 1, 1900 (§ 28, p. 870), and provided (§ 7, p. 864):

> The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation free from such limitation.

Similarly the act of June 30, 1902, 32 Stat. 500, known as the Supplemental Creek Agreement, extended the period for allotment of Creek children to those born to enrolled citizens "subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date" (§ 7, p. 501), and with respect to the children of deceased allottees born after the latter date, provided (§ 16, p. 503):

> The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed.

The provision in section 9 of the act of 1908 is obviously an extension to all the Five Tribes of the Creek policy to provide in a limited way for the surviving children of deceased allottees born too late

to receive allotments. This is made certain by reading the language expressing that purpose apart from the other provisions with which it is confused, thus:

> That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain . . . for the use and support of such issue, during their life or lives . . . but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, . . . the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.

The language omitted relates to another subject, that of restrictions on alienation, and its insertion in this section was made necessary because of other provisions of the act relating to that subject. Section 1 restricts the alienation of "all homesteads" of allottees "having half or more than half Indian blood" until April 26, 1931, and authorizes the Secretary of the Interior to "remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." And the first part of section 9 provides that "the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land," except as to full-blood In-

dian heirs. To avoid conflict it became necessary to provide in connection with the life interest in the homestead given to after-born children that such land should be "inalienable" until April 26, 1931, unless restrictions against alienation should be removed by the Secretary of the Interior "in the manner provided in section one," or unless the life tenant should die before that date. The entire separability of the clauses made necessary by other provisions of the act from those creating the life interest is at once manifest on reading the provision in question with the former clauses inclosed in brackets, thus:

> That if any member of the Five Civilized Tribes [of one-half or more Indian blood] shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain [inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof,] for the use and support of such issue, during their life or lives, [until April twenty-sixth, nineteen hundred and thirty-one]; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, [or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one] the land shall [then] descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions.

It is thus apparent that the insertion of words made necessary by other provisions to preserve harmony was not intended to modify in any respect the life interest otherwise conferred, and that the provisions for restrictions on alienation, and for their removal by lapse of time or action of the Secretary before the termination of the life interest, were intended to have no other effect on that interest than to regulate the manner of its conveyance.

Any other construction would impute to Congress the intention to repudiate its solemn agreements with the Creek Tribe before referred to (31 Stat. 864, § 7; 32 Stat. 503, § 16) that "the homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after" the time fixed for closing allotments. We can see no reason to suppose that Congress had any such intention.

The courts below ruled that the life estate of the child Julia was terminable by the removal of restrictions on alienation of the land, and that the approval of the oil and gas lease by the Secretary of the Interior was such removal of restrictions and termination of her life interest in the oil and gas contents of the land. We believe that this ruling is a plain perversion of the purpose expressed in section 9 of the act and without support in any other provision.

The conclusion that the life interest is terminable by removal of restrictions on alienation, must find support if at all in the clause of section 9 author-

izing the Secretary to remove restrictions "in the manner provided in section one hereof." This specific reference to section 1 can not be disregarded. The power there given to remove restrictions is general in its scope and is found in connection with a general provision forbidding the alienation of all homestead allotments before April 26, 1931, and section 1 makes no direct reference to any sort of lease. But section 2 does specifically deal with leases and authorizes oil and gas leases to be made "with the approval of the Secretary of the Interior and not otherwise." In order to hold that the words of section 9, authorizing the removal of restrictions "in the manner provided in section one," also authorizes the removal of restrictions by approval of an oil and gas lease as provided in section two, it is necessary to conclude either that nothing was meant by this specific reference to section 1 or that the use of the word "one" was intended to include the meaning of the word "two."

To meet this difficulty the majority of the Court of Appeals argued (R. 40) that—

> as the whole is greater than any of its parts and includes them all, section one includes the power to remove the restrictions on the leaseholds and their products which the Secretary is also empowered to remove by means of his approval of leases under section two.

It seems to us that this reasoning involves the assumption that the provision of section 2 is wholly superfluous and that it was so regarded by Congress

when in section 9 specific reference was made to section 1.

Moreover, the lease itself in this case, concededly in lawful form, may be surrendered by the lessee and is also subject to cancellation for violation of any of its substantial terms and conditions. R. 18. If it could be regarded as a removal of restrictions on alienation of the oil and gas in the ground, its surrender or cancellation would have to be regarded as a reimposition of such restrictions, unless the oil and gas contents of the land were considered as thereafter subject to unrestricted alienation.

II.

In the case of a technical life estate at common law, mineral deposits, unopened and unauthorized to be opened at the time of the inception of the life tenancy, belong to the remainderman as a part of the land. *Koen* v. *Bartlett*, 41 W. Va. 559, 565–567, and cases cited; *Higgins Oil & Fuel Co.* v. *Snow*, 113 Fed. 433, 437–439, and cases cited. But in section 9 of the act of 1908 Congress was not dealing in common-law technicalities, and the authority to explore and operate this land for oil and gas was provided in section 2. The purpose in mind was to insure something of real and substantial present value for orphan children of allottees born too late to receive allotments. Other children and the surviving parent had been amply provided for and were not then the subject of especial anxiety. In the case of land mainly valuable for oil and gas this purpose would have

been largely defeated by a provision for a mere technical life estate in 40 acres of the parent's allotment without some provision for extraction and use of those minerals. If the technical objection against the opening of mines by a life tenant was at all considered, it is reasonable to conclude that this objection was intended to be met by the authority conferred by section 2 on the Secretary of the Interior to approve oil and gas leases.

It is suggested that a division of the royalties among the heirs gives something to the child Julia because she is one of them. But we find no justification for such a division. She is an heir, indeed, but only for her life. She is not a remainderman. On her death the estate goes to the heirs of her parent the deceased allottee. Nothing goes to her heirs, unless it be something received by her during life as rents and profits from her parent's homestead over and above what is necessary for her support. Moreover, her sister and father, the other claimants, are not heirs at present and may never become such. If they should die before Julia's death, which is likely in the natural course, they never will come into the remainder. It is hardly conceivable that Congress intended to authorize this oil and gas lease for the present benefit of those already amply provided for in their own right and who might never inherit the land, and restrict the one who had received nothing in her own right, and who was therefore the subject of especial concern, to the mere use for farming and grazing purposes. The

courts below attempted to overcome these difficulties by holding that Julia's life estate in the land was subject to termination by removal of restrictions on alienation, and that the Secretary's approval of the oil and gas lease was such removal of restrictions as to the oil and gas in the land. But that conclusion, as we have heretofore shown, can not be arrived at without disregarding or changing the plain meaning of the controlling words of the act.

III.

The decree of an equal division of the royalties among all the heirs of the deceased allottee can not be sustained on common-law principles. Considering the lease as a sale of that part of the land consisting of the oil and gas, notwithstanding restrictions on alienation, as considered by the courts below, it is necessary to consider also the fact that all of the heirs joined in executing the lease, the two daughters who are minors by their guardians. R. 13, 19. If this be regarded as a conveyance by both the life tenant and the remaindermen, the common-law rule is that the former is entitled to the income from the royalty fund at not less than the legal rate of interest during her life. *Barnes* v. *Keys*, 36 Okla. 6, 7–9, and cases cited.

If this be the correct rule (which we do not admit) it can only be so by virtue of regarding the lease by the Secretary of the Interior as a removal of restrictions on alienation "in the manner provided in section one" of the act. That section authorizes

such action "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." 35 Stat. 312. This would be ample authority for investment of the royalty fund during the life of Julia and the use for her benefit of the income. No such regulation was made in this case doubtless because the Secretary believed that Julia was entitled to the entire fund during her life, as his representatives the appellants now contend. But such regulation can be made if necessary under the terms of the lease. It provides in section 2 for payment of the royalty to the Indian superintendent (R. 16) and in section 8 (R. 18) that:

> This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease.

That part of the decree which directs "payments to be made in accordance with the rules and regulations of the Secretary of the Interior in such cases provided" (R. 26) is not objectionable.

Section 25 of the "Regulations Governing Leasing of Lands and Removal of Restrictions of Members of the Five Civilized Tribes, Reprinted June 1, 1916," reads as follows (p. 12):

> 25. All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be deposited by the Indian agent or other Government officer to whom paid, to the credit of the guar-

dian or curator of such minor or incompetent, in some national bank or banks designated by the Commissioner of Indian Affairs, and may be withdrawn therefrom by such guardian or curator, with the consent of the United States Indian agent, in sums not exceeding $50 per month unless otherwise ordered by the court. Sums in excess of $50 per month may be withdrawn on order of the proper court and not otherwise. Such designated banks shall furnish satisfactory surety bonds, to be approved by the Secretary of the Interior, guaranteeing the safe care and custody of the funds so deposited. (Amended July 23, 1910. See p. 31.) (Amended Nov. 29, 1912. See p. 38.)

An amendment adopted November 29, 1912 (p. 38), provides:

Section 25 of the Revised Regulations of April 20, 1908, covering the leasing of the lands in the Five Civilized Tribes repromulgated June 20, 1908, is further amended by adding to the said section as rewritten and amended July 23, 1910, the following:

"Provided, however, that the said superintendent, or other officer in charge of the Union Agency, is authorized, in his discretion, where considered for the best interests of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents or payments accruing under any lease have been paid to said superintendent, to withhold the disbursement of such royalties, rents or payments, wholly or in part from any such adult,

or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs."

CONCLUSION.

It is respectfully submitted that the decrees of the Circuit Court of Appeals and the District Court should be reversed and that the cause should be remanded to the District Court with directions to enter a decree establishing the right of Julia Willingham to the accumulated royalties from the oil and gas lease and to the royalties to accrue in the future during her life.

FRANCIS J. KEARFUL,
Assistant Attorney General.

MARCH, 1919.

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No. 284.

In the

Supreme Court of the United States.

October Term, 1918.

GABE E. PARKER, Superintendent for the Five Civilized Tribes, *et al.*, - - - - - *Appellants,*

VERSUS

TOOTIE RILEY, a Minor, By U. C. STOCKTON, Her Guardian, *et al.*, - - - - - - *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEE TOOTIE RILEY

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AUTHORITIES CITED.

34 Okla. 129. 42

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 254.

GABE E. PARKER, Superintendent for the Five Civilized Tribes, *et al.*, - - - - - *Appellants,*

vs.

TOOTIE RILEY, a Minor, By U. C. STOCKTON, Her Guardian, *et al.*, - - - - - - *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEE, TOOTIE RILEY.

The statement in the brief for appellants sufficiently sets forth the facts to present the question involved in this appeal.

Appellants' Propositions 1, 2, and 3 (appellants' brief page 6) are all based upon the single proposition that the interest of Julia Willingham, under section 9 of the Act of May 27, 1908, is a life estate. Such construction of that section, if we have correctly interpreted their argument, is made possible only by eliminating from the reading, in gathering the

after-born child's interest, the clauses enclosed in brackets by them on page 10 of their brief, "[inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof,]" and the further clause, "[until April twenty-sixth, nineteen hundred and thirty-one]." This is a confession that the omission of these clauses from the reading is essential to make the section at all compatible with the theory of a life interest, and this is quite true. They say, in short, that these words were inserted "in connection with the life interest in the homestead given to after-born children" in order to avoid conflict with section 1. The error in this construction arises from the failure to first definitely fix in mind the cardinal purpose of the Act which was to remove the restrictions on alienation of Indian allotments, and the failure also to clearly analyze the precise restrictions. Section 1 broadly removes all restrictions with two specific exceptions as follows:

(1) All homesteads of allottees having half or more than half Indian blood;

(2) All surplus lands of allottees having three-quarters or more Indian blood.

All other restrictions were removed save these two classes, and even as to them the restrictions

were retained only until April 26, 1931, so that on that date restrictions entirely cease and no conceivable limitation on the transfer of Indian property longer remains.

Further provision was made, however, for the termination of the restriction retained as to the two excepted classes even prior to April 26, 1931, in two ways: *1*, by removal through the Act of the Secretary of the Interior, whose authority to do so was preserved in careful language; *2*, by death of the allottee as provided in section 9. By section 9, death operated as a wholesale removal of restrictions on conveyances by the heirs of the deceased allottee, with two exceptions, on the construction of the second of which the decision of this case depends. By the first exception or proviso, conveyances by the full-blood heirs were required to be approved by county courts of Oklahoma; by the second, it was said, as an exception to the announcement that the death of any allottee shall remove all restrictions, that in case the deceased allottee left issue born after March 4, 1906, that the homestead allotment "shall *remain* inalienable, *unless* restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section 1 hereof, for the use and support of such issue, during their life or lives, *until* April twenty-sixth, nineteen hundred thirty-

one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred thirty-one, the land shall then descend to the heirs, etc."

Now, then, since the restriction against the alienation of such homestead expired under section 1, as above pointed out, on April 26, 1931, why was it necessary to use the clause, "unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided by section one hereof," in order to avoid a conflict, as appellants claim, with the provision made for the after-born issue? Suppose the clause had not been left out, what would have been the meaning? Simply that the homestead would have "*remained*" for the "use and support" of such issue, during their life or lives, until April 26, 1931, the words "during their life or lives" being a favorite phrase in Indian legislation, as we will hereafter point out, and having no other significance than that the given period of restriction will be terminated by the earlier decease of the persons mentioned. On the theory that the interest of the after-born issue is bound to continue, at all events, until April 26, 1931, it was not only unnecessary to insert the clause in question, but contradic-

tory, because it makes provision for an earlier termination. On the theory that such interest was a life estate, the insertion of the clause instead of avoiding, makes a conflict, for it limits the use, at the outside, if restrictions be not removed, until 1931. Had the intention been, as appellants claim, to vest a life estate, it would have been necessary, instead of inserting, to omit the clause. But even had the clause not been inserted in the passage, leaving it, as it would then have stood, without any additional language evincing the creation of a life estate, the use and support interest would have still ceased on April 26, 1931, as otherwise there would result a conflict with section 1, which arbitrarily terminates all restrictions on that date. A constructon of one part of an act will not be adopted which is repugnant to some other provision of the act, and especially where such conflict would be between a subordinate provision and one which embodies the general scheme of the act, but such construction will be given, if possible, as will harmonize all parts. Section 1 sets forth the entire scheme of the removal of restrictions, terminating restrictions on homesteads of allottees of half or more than half Indian blood on April 26, 1931, and appellants' theory of a life estate, of any other interest in such homestead projected beyond that date, is in necessary conflict with section 1.

Appellants say, furthermore, (p. 11) that the clauses in question "were intended to have no other effect on that interest than to regulate the manner of its conveyance." The Act imposes no individual restrictions on the disposition by the after-born issue of the special interest in the homestead, and it is inconceivable that the removal of restrictions by the Secretary of the Interior, spoken of, could have any application to such interest. Besides, appellants expressly contend (p. 11) that the asserted life interest is not terminable by the removal of restrictions on alienation. How then could the language with reference to the removal of restrictions on the alienation of the homestead by the Secretary of the Interior, be said to "regulate the manner of the conveyance" of such life interest?

But take the further language in the latter part of section 9, "or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred thirty-one, the land shall then descend to the heirs, etc." If there was a life estate in the issue, why use the words "*before* April twenty-sixth, nineteen hundred thirty-one?" Why not have said "upon the death of the issue herein provided for," because such death might occur either before or after (more probably after) April 26, 1931—the ordinary phraseology for letting the remainder man in on the

death of the life tenant? The meaning is clear that this phraseology was adopted in connection with what had gone before to keep clear that the interest of the after-born issue would continue, unless terminated sooner by the Act of the Secretary, until April 26, 1931, provided such issue did not die before then; and if so, then the remainder men would be immediately let in, the estate having already been cast. *Bartlett* v. *Okla Oil Co.* (E. D. Okla.) 218 Fed. 380.

The omission of the bracketed clause, "inalienable unless restrictions, etc." contended for by appellants, would separate the entire clause from the verb "remain," which it clearly qualifies. The clause cannot be thus detached, for the word "inalienable" is inseparable from the word "remain." It is the "inalienability" that is to "remain." It is not said that the homestead is to "remain for the use and support" of such issue, but, that instead of being at once freed from restrictions by death of the allottee, it is to "*remain* inalienable," to the end, or so that, it may be for the use and support of the specified issue. The only way in which the issue could get such benefit, is for the homestead to "remain inalienable" for the period, or on the contingency mentioned.

Appellants say (p. 11) that the courts below ruled "that the life estate of the child Julia was term-

inable by the removal of restrictions on alienation of the land," and complain of this ruling on the ground that the life estate is not terminable by the removal of restrictions. The answer to this is, in the first place, that the courts below did not rule that such "life estate" was thus terminable but, on the contrary, held that there was no life estate in Julia. It is not necessary to discuss what would be the effect of a mere order of removal of restrictions not followed by an actual alienation under the order of removal, as that question is not presented; suffice it to say that the purpose of the second proviso of section 9 was to preserve the homestead from sale for the use and support of the late born child during the specified period, the converse showing that a sale would oust such use and support. It is but common sense to say that if the homestead should be sold, the minor child could no longer have the use of it; and hence the lower courts held that the alienation in part of the homestead, duly approved by the Secretary, would terminate the interest of the child Julia as to the part alienated, and as to the part so sold, the proceeds became at once divisible among the heirs.

Appellants further contend that the child Julia is not one of the heirs to the entire estate. This view is bound to be predicated solely on the assumption that Julia has a life estate, which is the very question

to be decided. It might be true that if she is given a life estate in the homestead, such estate would be exclusive, and she would not take as a general heir. Her interest in that case, however, would be greatly reduced where the land is chiefly valuable for minerals, as the life tenant cannot open new mines. Thus the rule adopted by the decision of the lower courts is more favorable, in the instant case, to her than to have held that she had a life estate, had the remaindermen refused to execute the lease, because if she is not a life tenant, we take it that no one would contend that she is not an heir under the provisions of section 9, adopting the laws of descent and distribution of the State of Oklahoma.

Appellants seek to reinforce their construction, that the child Julia takes a life estate, with the proposition that under section 7 of the Act of March 1, 1901, 31 Stat. 861, and section 16 of the Act of June 30, 1902, 32 Stat. 500, quoted on page 8 of their brief, provision was made for Creek children born after May 25, 1901, and that any other construction than the one contended for by them would impute to Congress an intention to violate solemn agreements with the Creek tribe. Not so. This contention of appellants overlooks that by Act March 3, 1905, 33 Stat. 1048, 1071, the tribal rolls were reopened to such Creek children, with other tribal children, so as to

include all those living on March 4, 1905, and that by Act of April 26, 1906, 34 Stat. 137, section 2, the tribal rolls were again reopened to Choctaw, Chickasaw, Cherokee and Creek minors living on March 4, 1906, thus supplanting the quoted provisions of said sections 7 and 16 by the substitution of a larger provision. But even by said sections 7 and 16 of the Acts of March 1, 1901, and June 30, 1902, respectively, the children therein provided for would not take a life estate, but only the right of use during the period of restriction as defined in those Acts. We cannot find any express decision that no life estate was created by sections 7 and 16, but the only sound interpretation, in our judgment, is that the provision simply gave the after-born children a right of use during the remainder of the period of restriction, instead of the restrictions passing off immediately upon the death of the allottee. But if there is any support to be found for the view that any greater interest was intended, it is significant that there are no such qualifications to the period of use in those sections as occur in section 9. In considering whether sections 7 and 16 making a provision for Creek afterborns specially, there being no corresponding provision made for such children of other tribal parents, were intended to be retained by section 9 it would seem a convincing reason against such implication that such former sections dealt with Creek children

alone, whereas section 9 of the Act of May 27, 1908, was a general enactment for all the Five Civilized Tribes.

The meaning of the second proviso of section 9 being natural and apparent, that the homestead should remain inalienable only for 21 years at the utmost, and subject to earlier termination, the conviction is irresistible that the contention for a life estate arises only out of the words "during their life or lives." Except for these words, doubtless no such contention would ever have been conceived. But, as already suggested, this expression has frequently occurred in the acts dealing with the Five Civilized Tribes, and always for the purpose of shortening the period of limitation on alienation. Thus section 12 of the Choctaw-Chickasaw Treaty, 32 Stat. 641:

> "Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment * * * which shall be inalienable *during the lifetime* of the allottee, not exceeding twenty-one years from the date of certificate of allotment. * * *."

The same expression is used in section 13 of the same Act, and the same, identically almost, in section 13 of the Creek-Cherokee Treaty, 32 Stat. 716. Likewise, by section 8 Act of March 3, 1903, 32 Stat. 982, dealing with the Seminoles, it is said:

> "That the homestead referred to in said Act shall be inalienable *during the lifetime of the allottee,* not exceeding twenty-one years, from the date of the deed for the allotment." (Our italics.)

Construing section 12 *supra,* of the Choctaw-Chickasaw Treaty in *Mullen* v. *U. S.*, 224 U. S. 48, 56 L. ed. 834, this court said:

> "It will be observed that the homestead lands are made inalienable 'during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.' The period of restriction is thus definitely limited, and the clear implication is that when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of the twenty-one years. Thus, with respect to homestead lands, the supplemental agreement imposed no restriction upon alienation by the heirs of a deceased allottee."

To the same effect: *In re Lands of Five Civilized Tribes,* 199 Fed. 811; *Stout* v. *Simpson,* 34 Okla. 129, 124 Pac. 754.

Just as in the former acts the expression "during the lifetime of the allottee" was not used to define or create an estate, so the similar expression in section 9 "during their life or lives" was not employed for the purpose of defining or fixing a legal estate.

but merely, as in the former acts, to show that while the period of restriction on the homestead for the use and support was limited to April 26, 1931, the earlier death of the beneficiary would cancel the restriction. Such an interest, limited and bounded as it is, not only fails to answer to any definition in the books of a life estate, but violates every legal concept of such an estate.

To what character of estate or interest, then, does it belong? Naturally, it is in some respects to be homologated to the provisions customary in the statutes of many states affording homestead occupancy to minor children of decedents. We shall presently consider what use Congress intended might be made of the homestead allotment by such issue. But with reference to the duration of the use by such issue, which we have already seen is limited, at all events, to a time certain, subject to be cut down by death or by the act of the Secretary of the Interior, fits quite precisely the definition and nature of an estate or interest for years.

In 11 Am. & Eng. Encyc. L. 381, discussing estates for years, it is said:

> "The term 'years' is merely descriptive, as such estate may be for a shorter period, as a certain number of months or weeks; but the essential characteristic of the estate is that its duration must be fixed and certain. And in ascer-

taining whether this characteristic exists or not, the maxim *id certum est quod certum reddi potest* is applicable.

"No especial words are necessary for the creation of an estate for years, but any form of words indicating an intention to transfer the possession for a certain definite time is sufficient."

And an estate for years may be created by contract, devise, or arise under statutory provisions, and may begin *in futuro.*

—18 Am. & Eng. Encyc. L. 209.

It is inferior to a life estate, not being a freehold, and the tenant is without seizin. He is possessed, not of the land, but of the term for years, while the seizin is in the owner of the fee.

—18 Am. & Eng. Enc. L. (2d ed.) 210;
11 *Id.* 381;
Hutcheson v. *Bennefield,* (Ga.) 42 S. E. 422;
1 Woerner, Am. Law Admin. 231.

Consequently, a term for years will not support dower.

—1 Woerner, Am. Law Admin. 231.

In *Whittome* v. *Lamb,* 12 Mees. & Wels. 813, the will said:

"And it is my will and desire that my said wife shall have the use and occupation, or annual increase, at her pleasure, of all that, my

> said farm-house and premises * * * with the appurtenances, during the minority of my sons, she keeping" (in good repair).

It was held that the words "use and occupation" "during the minority of the sons," gave the widow a term for years, and not ceasing upon her death.

Whatever the nature of the use which the issue born after March 4, 1906, may make of the homestead allotment, two things appear certain: One is that the interest is not a life estate, for it has none of the elements of such estate, and is not a freehold; the other is that the tenancy is one for years. What is the nature of the use which such issue may make of the homestead allotment? Resort must be had, in the first instance, to ascertaining, if we can, the intention of Congress. That intention, if clearly manifested, will not be defeated by any narrow rule. In *United States* v. *Allen,* 179 Fed. 13, ... C. C. A. ...., wherein the right of the United States to maintain an action to enforce restrictions against the alienation of Indian lands was challenged upon the ground of lack of proprietary interest in the lands, the majority opinion says that the restrictions were to be viewed in the light of a great governmental scheme for the protection of the interests of the Indians and that its policy was not to be frustrated by

viewing the provisions merely as real estate transactions and bounding them by the strict rules of law between grantor and grantee. The circumstances of that case are, of course, widely different from those of this case, as well as the occasion for invoking that rule of view, since the construction involves the determination of private rights in the same piece of property between heirs of the same allottee and all direct parties to the legislation. And if the intention as to the extent and nature of the use be not obvious, then that intention should be found within familiar common law rules, and these be not breached to discover such intent. Guided, however, by the spirit of the rule stated by the court, we shall discover nothing in the manifested intention of Congress in section 9 transgressing the principles laid down by us.

In gleaning the legislative intent, some preliminary reflections arise at the threshold. It is to be well fixed in mind that the entire act in which the section occurs is one dealing with restrictions upon alienation. The section itself professedly deals with that subject, the special interest of the specified issue arising as if incidentally. This court, in *United States* v. *Knight*, 206 Fed. 145, quoted the language of the Supreme Court in *Tiger* v. *Western Development Co.*, 221 U. S. 286, with reference to section 9 of Act of May 27, 1908:

> "The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interest of full-blood Indians to be approved by a competent court,"

and added this language:

> "While the Supreme Court was not construing section 9, it was before the court, and we are informed as to what the court thought was its obvious purpose."

Such being the obvious purpose of section 9, and not the creation of particular estates in land; and the further fact remaining that the words under construction are contained in a proviso wherein, although it is competent, as pointed out in the *Tiger* case, to enact independent legislation, it is not customary, we are led to pause before indulging a belief that Congress intended to create so serious and important an estate in lands, to the exclusion of the other heirs, as the theory of appellants requires us to do.

We are furthermore bound to accept as true that Congress did not intend that such issue could or should execute a mineral lease of the kind in question, for the reason that it would be waste; for the further reason that rigid restrictions existed against such leasing which could only be removed by the Secretary of the Interior, and for the still further

reason that whatever use she might make of the allotment, she could only make such use as did not require the co-operation or joinder of the other heirs. Such use only was permitted to her as was reconcilable with each of these requirements, as to which we believe there can be no controversy or debate. No oil well or mine had ever been opened on the homestead at the allottee's death, nor was it even known that the land was mineral. A life tenant even, as we will hereafter demonstrate, could not open a new mine. A tenant for years, of course, could not. What, under all these conditions, which all must concede to be true, was intended by saying that the homestead should "remain inalienable, unless, etc., for her use and support"? Only such use as she could make under the above conditions, and which involved no act of alienation of any portion of the estate, for the express condition of the use conferred was that it remain inalienable. Inalienability and use and support were made coterminous. Within these conditions and limitations she must make her use. All these are necessarily implied and therefore as much a part of the law as that which is expressed. *(United States* v. *Allen, supra.)* When it comes to determine the extent and nature of the exercise of the use, which is not expressed, we are compelled to look for it within well recognized principles regulating rights between joint

heirs to the estate and depending upon the interpretation of the particular words, and we surely may assume that Congress intended that we might do so, no contrary intention appearing.

We will also look to other provisions affecting the subject matter, whether found in other acts and treaties, or in the same act containing the words of the grant. Looking to these it will be found that prior to the enactment of the Act of May 27, 1908, previous provision had been made for the execution upon the Secretary's approval of the mineral lease upon the homestead of a full-blood Creek. It will also be found that previous provision had been made for the making of an agricultural lease upon such homestead for not over five years, without approval. Subsequently an agricultural lease on such homestead for more than one year had been prohibited, as appears from the language of section 20, Act April 26, 1906 (34 Stat. L. 137), as follows:

> "*Sec. 20.* That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands *other than homesteads, of full-blood allottees* of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, shall be in writing and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval; *provided,* that *allotments* of mi-

nors and incompetents may be rented or leased under order of the proper court: *Provided, further,* that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory," (Italics are ours)

when read in connection with section 19 of that act.

This was the last expression on the subject of renting homesteads either for mining or agricultural purposes, until the enactment of Act of May 27, 1908, and by section 2 of that act agricultural leases on homesteads for periods not exceeding one year are authorized without restriction, no approval of the Secretary thereto being required. Such section is as follows:

"*Sec. 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper Probate Court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations pro-

vided by the Secretary of the Interior, and not otherwise: And *provided, further,* that the jurisdiction of the probate courts of the State of Oklahoma, over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in in this act, shall include all males under the age of twenty-one years, and all females under the age of eighteen years."

It will be readily observed in the foregoing section that in the provisos three different classes of leases are authorized to be made *with the approval* of the Secretary: *(1)* Leases of all restricted lands for oil, gas or other mining purposes, term not limited; *(2)* leases of restricted homesteads for more than one year *other* than oil, gas or other mining lease, *i. e.,* surface leases: *(3)* leases of restricted lands for periods of more than five years other than oil, gas or other mining leases. This third class would include homesteads, the words "restricted lands" being general and, therefore, the only reason for the specification of the second class of non-mineral leases for periods of more than one year on restricted homesteads was to show that such leases for not more than one year might be made without the Secretary's approval; in other words, there was no restriction on non-mineral leases on restricted homesteads for periods less than one year. We believe that this is a perfectly fair and logical de-

duction from the enumeration and specification of authorized leases in section 2.

What, then, follows? Of necessity—and there seems to us no escape from this conclusion—that the only use which Julia Willingham in her capacity as issue born after March 4, 1906, could make of the restricted homestead by and through her own act and independently of the Secretary's approval, and independently also of the joinder or co-operation of her co-heirs at law, was the execution, through her guardian and proper court approval, of a non-mineral lease for a period not to exceed one year. This being all the use of the restricted homestead which she in her capacity as such specified issue solely could make of the homestead, and special provision having been made in the same act for such leasing, and this being the only use to which the homestead could be devoted without removal of restrictions through the Secretary's approval, it appears to us that the reasoning is faultless that such was the use which Congress intended she could make of it—that is, through a hiring or letting of the premises for use or cultivation by others than the beneficiary individually, and when we add to this the consideration that such use comports with the legal principles concerning estates for life or years, and is that use which is alone permitted to such special tenants with-

in the ancient maxim of the law, it would appear that such conclusion is confirmed.

Another controlling rule of decision in cases involving the use which may be made of real estate by or on behalf of those not the owners of the fee, but for whom some special use has been created is that the court will take into consideration the circumstances and the customary and former uses made of the land. In a note to the case of *Lanyon Zinc Company* v. *Freeman et al.*, 68 Kan. 691, 1 Am. & Eng. Anno. Cases 406, it is said:

> "The construction to be placed upon a clause in a will which is claimed to confer authority on an executor to lease the lands for a certain purpose is governed by the familiar rule that the intention of the testator controls, and that intention is to be sought for in the language of the will, the condition of the testator and the surrounding circumstances. The purpose for which lands have been habitually used is an important and often determining consideration in arriving at the testator's intention as to the leasing thereof. If at the time of the execution of the will the lands were known to be valuable only for agricultural purposes a general authority to lease the lands would hardly include the power to lease for mining purposes."

This rule was invoked in *Reynolds* v. *Hanna*, 55 Fed. 783, in determining that a life tenant might make mineral use where "the chief and sole value of

the land was for coal mining purposes, and that the only profit to be derived therefrom was by sale or lease of the soil."

The case of *Lanyon Zinc Company* v. *Freeman et al.*, (Kan.) 75 Pac. 995, seems to us eminently in point. In that case Koontz, the testator, a resident of Ohio, died leaving a will in which he devised certain lands to his grandchildren with the condition embodied therein, that in the event the testator died before the period of eighteen years from the date of the will the executor and trustee should take charge of the premises, and "lease and maintain the same in repair and good condition, with a view to obtaining the best income therefrom without permitting the same to deteriorate in value or quality" until such period of eighteen years should elapse. The testator died in the same year that he executed his will, and consequently the provision inserted in the will directing him to lease and maintain the premises with a view to obtain the best income therefrom became of force. The widow of the testator declining to accept under the will, elected to take her one-half under the law of descent and distribution. Reuben R. Freeman qualified as executor and trustee of the estate. Shortly thereafter Freeman acquired the interest of one of the grandchildren devisee. Soon after acquiring this interest said Freeman, as

executor and trustee, and the widow jointly executed to the Lanyon Zinc Co. a lease granting unto the said company all the oil and gas under said premises, together with the right to enter thereon for drilling and operating for oil and gas, and reserving to the lessors the use of the premises for farming purposes, except such as used by the lessee, the lease providing that if no well should be drilled within ten years the lease should become void. Shortly afterward Freeman acquired the interest of another of the grandchildren in the premises. After all this one Taylor acquired the interest of the widow in the premises. Thereafter Taylor filed his suit for partition and the Lanyon Zinc Co. was made a party and contended that the interest of all the parties were subject to its claim under said oil and gas lease, and the validity of such lease was drawn in question. The court set apart the east half of the leased premises to the plaintiff as the widow's interest acquired by him, and as to that part held the lease of the Lanyon Zinc Company was in full force. But as to the west half, the court held the lease void in so far as it was executed by Freeman in his capacity as executor and trustee, on the ground that a mineral lease was not authorized by the quoted provision of the will and cancelled it to that extent, upholding it, however, as to the individual interest of Freeman acquired under the two grandchildren

devisees. The opinion is so applicable to the instant case that we quote at length from it:

> "Whether this oil and gas lease to the Lanyon Zinc Company was valid as against the interest of the said legatees in said premises must be determined by the extent of the authority given Reuben R. Freeman as executor and trustee under the will. The will provided that he 'lease and maintain the same in repair and good condition, with a view to obtain the best income therefrom without permitting the same to deteriorate in value or quality.' This language of the will can best be interpreted, and the intention of the testator best understood, in the light of the facts and surroundings at the time it was made. The admitted facts and the evidence disclose that the testator was a resident of Ohio. The land was farming land, and used for that purpose only. The surrounding lands were agricultural, and used for that purpose only. Natural gas had but recently been found in the neighborhood, and was being somewhat used in the City of Iola, not far distant. It can scarcely be said oil had been found in the neighborhood at that time. No gas or oil wells had been sunk upon these premises. None have since been sunk thereon. The oil and natural gas industry in that vicinity was then in fact new, and in its infancy. Did the testator contemplate the making of a lease to include the mineral below the surface, or did he contemplate the leasing of the surface of the land only? It is quite unlikely that he had in mind or intended other

than the leasing of the surface of the premises for agricultural purposes. Again, the lease to the Lanyon Zinc Company in controversy contemplated not the usual tilling or cultivation of soil and the growing of crops thereon. It granted to the Lanyon Zinc Company all the oil and gas under the premises, together with the right to enter thereon for the purpose of drilling and operating for oil and gas and the right to erect and maintain thereon and remove therefrom buildings, structures, pipes, pipe lines and machinery necessary for the production and transportation of oil and gas. Whatever may be the origin of petroleum and natural gas—and the question appears to be yet a matter of controversy—it is well settled that they are minerals. (Donahue on Petroleum and Gas, Secs. 7, 8; Thornton on Oil and Gas, Sec. 19.) Petroleum and gas, so long as they remain in the ground, are a part of the realty. They belong to the owner of the land, and are a part of it, so long as they are on it, or in it, or subject to his control. When they escape and go into other lands, or come under another's control, the title of the former owner is gone. (*Brown* v. *Spillen,* 155 U. S. 665, 15 Sup. Ct. 245, 30 L. ed. 304; *Oil Co.* v. *Indiana,* 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 729; *Murray* v. *Allred,* 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740; *Kelley* v. *Ohio Oil Co.,* 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721.) In the case of *Wilson* v. *Youst,* 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292, the court held that an oil lease investing the lessee with the right to

remove all the oil in place in the premises in consideration of his giving the lessors a certain per cent thereof is, in legal effect, a sale of a portion of the land. In the case of *Stoughton's Appeal*, 88 Pa. 198, it was said that: 'A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease, but without the approval of the Orphans' Court he cannot dispose of any part of the realty. Oil is a mineral, and, being a mineral, is a part of the realty; and a guardian cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of the *corpus* of the estate of his ward.' It was held in the case of *Marshall* v. *Mellon*, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601, that 'a tenant for life has no right to operate for oil or gas, or to make oil or gas lease, unless operations for oil or gas were commenced before the life estate accrued.' To the same effect is the case of *Williamson* v. *Jones*, (W. Va.) 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, and the case of *Hook* v. *Garfield Coal Co.*, (Iowa) 83 N. W. 963. We do not believe, from the language used in the will, and the circumstances and surroundings at the time it was made, that it was the intention of the testator to authorize the executor and trustee to execute the oil and gas lease in controversy to the Lanyon Zinc Company. Nor did the will authorize Freeman, as executor and trustee, to execute the lease in controversy, and bind thereby the interest of the legatees."

Neither at the time the act in question was passed, nor at the death of the allottee, Emma Derrisaw, as has been said, was it known that the homestead was underlaid with oil or gas or possessed any mineral character whatever. Had the grant of the interest given to Julia Willingham been contained in the terms of a will, or private grant, as in the case just cited, instead of in the section under discussion, with express power to lease, there can be no doubt in such instance that neither the beneficiary nor executor or trustee in her behalf could have executed under the power the oil·lease in question, for the reason independently of others which we have noted, that a mineral lease was not contemplated under the power, but only the agricultural, or ordinary surface use intended.

Next, we assert that the lower courts were correct in holding that the approval of the oil and gas lease was, within the meaning of the Act of Congress, an alienation of the land, or the affected portion thereof. Nor do we understand that the appellants question in this court the correctness of such ruling, but only that Julia's interest in her mother's estate is exclusive and not subject to termination by removal of restrictions or alienation. Nevertheless, to a true determination of that question, this court, if it should feel a doubt upon it, is en-

titled to any assistance which counsel may be able to afford, and we, therefore, present the results of our investigation on that question, although the able and convincing majority opinion of the Circuit Court of Appeals in this case is exhaustive of that question. Indeed as we read his opinion, Judge REED did not dissent from that conclusion of the majority opinion.

The approval of the oil and gas lease did not effect, to be sure, a complete alienation of the land from the heavens to the center of the earth, but under the terms of the lease and the nature of the property conveyed, it was, in fact and in law, an alienation of the most material and substantial portion of the estate, and a transfer of that portion which we have seen Julia Willingham by virtue of her special interest for use and support could not have made. It was a transfer, too, which involved the removal of an ironclad restriction against such disposition against that part of the estate. The lease is for a term of ten years of all the gas and oil, and with the right to continue in perpetuity the taking of the oil and gas. That, under the authorities, was clearly a sale of that portion of the *corpus* of the estate for it is apparent that the use of the land for oil mining purposes practically absorbs its value.

This court has, it seems to us, laid down the principles which are decisive of this question in the

case of *United States* v. *Noble,* 237 U. S. 74, 59 L. ed. 844. The case arose out of a mineral lease of the allotment of a Quapaw Indian. The Act of March 2, 1895, made the allotment inalienable for twenty-five years from the date of patent. A later act authorized the allottee to lease the allotment for a period of ten years. A lease was made under authority of the later act reserving royalties (also other leases), and afterwards the royalties were assigned. The later act authorizing the lease was regarded by this court as a removal *pro tanto* of the restriction against alienation, and the rents and royalties to accrue under the lease as part of the estate remaining in the lessor, and which by reason of the restriction the lessor could not assign. For the convenience of the court, we copy that part of its opinion more directly bearing:

> "*1.* We may first consider the assignments of rents and royalties. Under his patent, the allottee took an estate in fee, subject to the limitation that the land should be 'inalienable for the period of twenty-five years' from date. This restriction bound the land from the time stated, whether in the hands of the allottee or his heirs. *Bowling* v. *United States, supra.* It put it beyond the power of him, or of them, to alienate the land, or any interest therein, in any manner except as permitted by the Acts of 1896 and 1897. See *Taylor* v. *Parker,* 235 U. S. 42, *ante,* 121, 35 Sup. Ct. Rep. 22. The comprehen-

siveness of the restriction was modified only by the power to lease; and while the allottee could make leases, as provided in these acts, they gave him no power to dispose of his interest in the land subject to the lease, or of any part of it. The rents and royalties were profits issuing out of the land. When they accrued, they became personal property; but rents and royalties to accrue were a part of the estate remaining in the lessor. As such, they would pass to his heirs, and not to his personal representatives. 1 Washb. Real Prop. 337; *Wright* v. *Williams*, 5 Cow. 501. It is true that the owner of the reversion, when unrestricted in his right to convey, may sever the rent and grant it separately, but this is by virtue of his freedom to deal with the estate in the land. 2 Bl. Com. 176.

"It necessarily follows that the allottee in the present case, having no power to convey his estate in the land, could not pass title to that part of it which consisted of the rents and royalties. It is said that the leases contemplated the payment of sums of money, equal to the agreed percentage of the market value of the minerals, and thus that the assignment was of these moneys; but the fact that rent is to be paid in money does not make it any the less a profit issuing out of the land. The further argument is made that the power to lease should be construed as implying the power to dispose of the rents to accrue. This is wholly untenable. The one is in no way involved in the other; the complete exercise of the authority which the statute confers would still leave the rents and royalties to

accrue as part of the estate remaining in the lessor. It was the intent of Congress that the allottees, during the period of restriction, should be secure in their actual enjoyment of their interest in the land. *Heckman* v. *United States, supra.* The restriction was removed only to the extent specified; otherwise, the prohibition against alienation remained absolute."

Discussing the two assignments of royalties, the court said:

> "Both were assignments of interests which pertained to the reversion, and both must be held to be invalid under the statute."

In *United States* v. *Gratiot,* 14 Pet. (U. S.) 526, the Supreme Court held that an instrument which was a lease for smelting lead ore was one that could be properly executed under authority of the words, "dispose of" the public lands used in the constitution; in other words, that a mineral lease was a disposal of land.

If we have misconstrued or misapplied these cases from this court, then we beg that the court give consideration to the following authorities:

The Supreme Court in *Burke* v. *Southern Pacific Railroad Co.,* 234 U. S. 669, 58 L. ed. 1527, has settled that petroleum or mineral oil is a mineral, consequently it becomes like coal, or other mineral in place. The authorities are in practical harmony that a lease

of all the minerals, or of the oil and gas, upon premises containing terms substantially like the lease in the instant case constitutes a sale to that extent of the land.

—*Moore* v. *Sawyer*, 167 Fed. 826, 836;

Eldred v. *Okmulgee Loan & Trust Co.*, 22 Okla. 742, 98 Pac. 929;

Sharp et al. v. *Lancaster*, (Okla.) 100 Pac. 578;

Barnes v. *Stonebraker*, (Okla.) 100 Pac. 579;

Barnes v. *Stonebraker*, (Okla.) 113 Pac. 903;

Barnes v. *Keys*, (Okla.) 127 Pac. 261;

Stoughton's Appeal, 88 Pa. 201.

Marshall v. *Mellon*, 179 Pa. 371, 35 L. R. A. 816, 819;

Blakely v. *Marshall*, 34 Atl. (Pa.) 564.

Wilson v. *Youst et al.*, (W. Va.) 28 S. E. 781;

Williamson et al. v. *Jones*, (W. Va.) 27 S. E. 411;

Tidwell v. *Dobson*, (Okla.) 131 Pac. 693;

Brooks v. *Cook*, (Ala.) 38 So. Rep. 641;

Haskell v. *Sutton*, (W. Va.) 44 S. E. 533;

Brewster v. *Lanyon Zinc Co.*, (C. C. A.) 140 Fed. 801;

U. S. v. *Noble*, (C. C. A.) 197 Fed. 292;

Truskett v. *Closser*, (C. C. A.) 198 Fed. 835;

Hook v. *Garfield Coal Co.*, (Iowa) 83 N.W. 963;

South Penn Oil Co. v. *McIntyre,* 44 W. Va. 305, 22 S. E. 926;

Guffey v. *Smith,* 237 U. S. 101, 113, 59 L. ed. 856, 863.

Eldred v. *Okmulgee Loan & Trust Co., supra,* is a well-considered case holding that an oil and gas lease was an alienation, not only within the meaning and intent of the Act of Congress, but also by the general principles relating to the conveyance of the estate, and in a discriminating review of the common law authorities showing that such a lease is an alienation by deed. This case has been followed uniformly by the subsequent decisions of the Supreme Court of Oklahoma. (See authorities *supra.)*

In *Duff* v. *Keaton,* 33 Okla 92, 124 Pac. 291, wherein the Supreme Court of Oklahoma, after a careful review of the particular statutes of that state, which constitute the procedure for the sale of the lands of minors, held that an oil and gas lease was not a "sale" of lands within the meaning of those statutes, carefully pointed out that its decision did not conflict with the *Elred* case, saying: "This conclusion does not militate against the rule announced in *Elred* v. *Okmulgee Loan & Trust Co.,* 22 Okla. 748, 98 Pac. 929," and then proceeds to restate what had been held in that case. In *Barnes* v. *Keys,* (Okla.) 127 Pac. 261, cited by appellants, the court said:

"As was held in *Stoughton's Appeal,* 88 Pa. 201, and other cases in the same line, oil in place is a mineral, and being a mineral is part of the realty. An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain percentum thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises."

In *Brooks* v. *Cook, supra,* the court said:

"Rent is the consideration paid for the use of the land. Whether you denominate it a lease or by any other name, when a man acquires the right to take ore out of the land, he takes away a part of the substance of the real estate itself, and whether the consideration be called 'royalty' or by any other name, it is paid for the purchase of the substance which is taken away. Consequently, such a contract is a conveyance of a part of the real estate, and must be executed with the formalities required for conveyances of real estate. *Milliken* v. *Faulk,* 111 Ala. 658, 20 South. 594. In a case before the House of Lords in England, which was a mineral lease for 21 years, Lord Cairns said: 'Although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term, and there are no period-

ical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there, if he can find them, and to take them away, just as if he had bought so much of the soil.' Scotch & D. Appeals L. R., pp. 273, 283, 284. The great weight of authority, as well as the logic of the situation, so fully bear out this principle that we consider it fully settled that minerals in the earth are a part of the real estate, and that any instrument by which they are conveyed must be executed in accordance with the law in regard to conveyances of land."

In *Brewster* v. *Lanyon Zinc Co., supra*, Judge Van Devanter, speaking for the court, said:

"The position is taken in the bill that by reason of the clause which declares: 'Second party (the lessee) may at any time remove all his property and reconvey the premises hereby granted, and thereupon this instrument shall be null and void'—the lease was wanting in mutuality, was determinable at the will of the lessee, and was therefore equally determinable at the will of the lessor. The position is not sound. Although the parties with the sanction of a general practice denominated the instrument a 'lease,' strictly speaking it was not such, but was more in the nature of a grant *in praesenti* of all the oil and gas in the lands described—these min-

erals being part of the realty—with the right to enter and search for them, and to mine and remove them when found. *Lanyon Zinc Co.* v. *Freeman,* (Kan.) 75 Pac. 995; *Dickey* v. *Coffeyville Vitrified Brick & Tile Co.,* (Kan.) 76 Pac. 398. Because, however, of the designation given to the instrument by the parties, it is here spoken of and treated as a lease. It runs to the lessee, its successors and assigns, is without limitation as to time, and plainly shows that it is designated to be perpetual, if the oil or gas shall continue, and the lessee and those claiming under it shall fulfill its stipulations."

In *Hook* v. *Garfield Coal Co.,* (Iowa) 83 N. W. 963, the testator said in his will: "I give and bequeath unto my wife, Mary T. Thrash, all of my property, both real, personal and mixed of whatsoever kind and wheresoever situated, to have and to hold as long as she may live, and to use the same for her support in any manner she chooses, *except she is not to sell* any of the real estate I may die possessed of." The widow entered into a lease of the land for the purpose of mining coal. The lessee was to operate the mine in a businesslike manner, remove all the merchantable coal, and pay a royalty of 10 cents per ton for all merchantable coal. Speaking with reference to the validity of this lease under the power in the will the court said:

"The will clearly devised but a life estate to Mary T. Thrash. True, she had the right to

use the land for her support in any manner she saw fit, but she was expressly denied the right of sale. The execution of the mining lease was a sale of the property. The coal underneath the surface was a part of the real estate, and the lease thereof, in the form in which it was executed, was a transfer thereof. *Caldwell* v. *Fulton*, 31 Pa. St. 475; *Appeal of Duff*, (Pa. Sup.) 14 Atl. 364; *Railway Co.* v. *Sanderson*, 109 Pa. St. 585, 1 Atl. 394. We need not determine whether it passed title to unmined coal, for that question is not in the case. It surely passed title to all that was mined, and was therefore a sale of real estate."

Equally pertinent and vigorous is the language of the court in *Haskell* v. *Sutton, supra*, quoted in the opinion from the case of *South Penn. Oil Co.* v. *McIntyre*, 44 W. Va. 305, 22 S. E. 926:

"Petroleum oil, as it is found in the crevices of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land.' The only manner in which a guardian can lease or sell the land of his ward for the purpose of its development, or any other purpose, is in the manner prescribed by statute, under a decree of the court. A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease; but without approval of the orphans' court he cannot dispose of any part of the realty. Oil is a mineral, and, being a mineral, is part of the realty; and a guardian

cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of a part of the *corpus* of the estate of his ward."

We take it, therefore, that the authorities without any real conflict unite in holding that a mineral lease of the nature and terms of the one in controversy is an alienation, or sale of land.

We think it also true that it is an alienation in the sense in which such term is used in the Act of Congress. We have already alluded to and cited the various restrictions against mineral leasing contained in the several treaties with the Indian tribes and the Acts of Congress dealing with Indian allotments. Side by side with all these are found in each instance general restrictions against alienation of the lands of the allottees. These are followed by the various sections permitting mineral leases to be made upon approval thereof by the Secretary of the Interior. That such leasing is included within the general restrictions on alienation is conclusively shown by the sections inserted in juxtaposition authorizing the leasing. Thus it is placed beyond debate that a restriction on alienation is a restriction on mineral leasing. Conversely it must be true that a removal of restrictions against leasing is a removal of restrictions against alienation. The ap-

proval of a lease is as much a removal of restriction to the extent that it goes as any general order removing restrictions, so far as the nature of the two acts is concerned, because they involve equally the exercise of the same investigation, judgment, and *quasi*-judicial discretion by the same officer, the Secretary of the Interior, in each instance. Indeed, since the approval of the lease is to be made according to the rules and regulations prescribed by the Secretary of the Interior he may prescribe the same rules for both, or different rules and regulations for each, so that the manner of the exercise of the power, being arbitrary, is immaterial. The fact remains that in substance the two acts of removal are in nature and essence the same. It will be noted that section 9 in the proviso under discussion uses the words: "Unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section 1 hereof."

Appellants urge, however, that as section 9 says, "in the manner provided by section one," and as the removal of restrictions on leases is provided in section 2, that leases are not contemplated. This would seem technical. Leases being a species of alienation, and included in the general power of removal of restrictions conferred by section 1, its repetition in section 2 cannot take it away. Besides, if literalness be insisted on, it might equally be con-

tended that the provision in section 9 for the removal of restrictions "in the manner provided by section one," is without meaning, for no particular manner of removal except by reference is specified in section 1. However, it is there said that the Secretary "may remove such restrictions, *wholly or in part, under such rules and regulations* * * * *as he may prescribe;*" and "continue to remove restrictions *as heretofore,*" and this is the "manner" meant by section 9, and the language, therefore, is appropriate for the inclusion of leases.

There is yet another reason why leases are included. Section 1 says the Secretary "may remove such restrictions." What restrictions? We find the answer in the opening words of section 1:

> " * * * That from and after sixty days from the date of this act, the status of the land allotted * * * shall as regards restrictions on alienation *or incumbrances* be as follows: * * * All homesteads * * * and all allotted lands * * * shall not be subject to alienation, contract to sell, power of attorney, *or any other incumbrance* * * * except that the Secretary of the Interior may remove such restrictions * * * ." (Italics ours.)

Now an "incumbrance" certainly includes a lease. *Hoover* v. *Chambers,* (Wash. Ty.) 13 Pac. 547. When, therefore, it was said in section 9 that the homestead should be made inalienable, and thus

Stant v. Simpson, 34 Okla. 129, an Indian Co

the restrictions against alienation removed by the Secretary in the manner provided in section 1, restrictions against leasing are just as much included as any other species of alienation. Neither are we to overlook the words that the Secretary may remove such restrictions "wholly or *in* part." The approval of an oil and gas lease is a removal of restrictions "in part."

It will be found in every instance affecting the validity of leasing of their allotments by members of Indian tribes, that such leasing is uniformly treated as falling within the prohibitions upon the alienation of their lands. It is thus well established from the acts and the treaties, and by the interpretation and the construction thereon placed by the courts, that restrictions upon alienation are restrictions upon leasing; that leasing is alienation. We lay this proposition down from the acts and decisions with the utmost confidence that it cannot be successfully questioned or assailed. It must follow, therefore, from the strictest rules of logic, of precedent and of common sense, that the Supreme Court of Oklahoma was correct in saying as it did in the case of *Eldred* v. *Okmulgee Loan & Trust Co.* that an oil and gas lease was an alienation within the meaning of the Acts of Congress governing restrictions upon alienation, and that the lower courts were likewise correct in so saying in the instant case.

When, therefore, the Secretary of the Interior removed the restrictions upon mineral leasing of the homestead allotment of Emma Derrisaw he did that which terminated any special interest which Julia Willingham may have had, if any, as to such portion of the estate, and the proceeds thereupon became immediately divisible, the descent having been already cast.

—*Bartlett* v. *Okla Oil Co. et al.*, (E. D. Okla.) 218 Fed. 380;
Doe v. *Considine*, 73 U. S. 458, 18 L. ed. 869;
Fitzpatrick's Estate, 233 Pa. St. 33, 27 Am. & Eng. Anno. Cas. 320, and note.

Appellants also argue (p. 15) that, considering the lease as a sale of that part of the land consisting of oil and gas, the decree of an equal division cannot be sustained because the heirs having joined in the lease, the life tenant is entitled to the income on all the royalty funds at not less than legal interest during her life, and cite *Barnes* v. *Keys*, 36 Okla. 6. This argument rests on the predicate that Julia is a life tenant, whereas that is the question for decision. The argument also overlooks that alienation of such part of the land, by the very terms of the act, discontinues her special interest as to the part of the land consisting of the oil and gas. In truth, since she alone could not make an oil and gas ~~tenant~~ lease or open a mine, she really had no

usable or practicable interest in that part, and the decree is highly beneficial to her. Appellants, while urging that Congress does not deal in common law technicalities, still invoke the strict application of the rule of law for the division of royalties between life tenants and remaindermen. By that rule, as laid down in *Barnes* v. *Keys*, the royalties would remain indivisible for Julia's life, and she having, as the youngest of them, the longest expectation of life, her father and sister would die without ever having received any portion of the royalties; or, if their present interest was distributed to them, they would receive, according to the calculation in *Barnes* v. *Keys*, only about one-sixth, and the remainder, together with all the surface use—practically the entire estate—would go to Julia, thus giving her an interest far in excess of the provision evidently intended for her, and in effect excluding the other heirs. If that result had been intended, it would have been about as well, and far simpler, for Congress to have said that the entire homestead should descend to the after-born child. Appellants further argue, in this connection, that as the lease provides that it is subject to the regulation of the Secretary of the Interior, that the Secretary may provide for investment of the royalty fund during the life of Julia for her use and benefit. It would seem unnecessary to point out in answer to this that the

power of the Secretary to regulate the custody and disbursement of the royalties is not the equivalent of the right to adjudge ownership as between the beneficiaries, but will be exercised only upon the respective shares of each in accordance with their rights.

We respectfully submit there is no error in the decrees of the Circuit Court of Appeals and of the District Court, and that the judgment appealed from should be affirmed.

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PARKER, AS SUPERINTENDENT FOR THE FIVE CIVILIZED TRIBES, ET AL. *v.* RILEY, A MINOR, BY STOCKTON, HER GUARDIAN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 254. Submitted March 19, 1919.—Decided May 19 1919.

Under § 9 of the Act of May 27, 1908, c. 199, 35 Stat. 312, the homestead of a full-blood Creek Indian who dies leaving a child born since March 4, 1906, is not freed from the restrictions on alienation by the death of the allottee, but is set apart for the "use and support" of such child during life, but not beyond April 26, 1931. P. 69.

Whether the special interest of the surviving child in such a case is, strictly speaking, an estate for life or for years, and what effect a removal of the restrictions on the homestead "in the manner provided in section one" of the act, after the death of the allottee, would have on the relative rights of such child and other heirs of the allottee, are questions not here considered. P. 70.

Where a child holding such a special estate under § 9 of the act joined the other heirs of the allottee, with the approval of the Secretary of the Interior, in leasing the allotment for oil and gas, upon a royalty basis, for the benefit of them all but without any provision for altering their rights *inter sese*, *held*, that, since the royalties took the place, *pro tanto*, of the land as the lessee extracted and took the minerals, the special estate attached to the royalties, and the child took the interest or income therefrom, while she lived, but not beyond April 26, 1931, leaving the principal, like the homestead, to go to the heirs in general on the termination of her special right. *Id.*

243 Fed. Rep. 42, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Kearful for appellants.

Mr. William J. Horton and *Mr. Ralph A. Smith* for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a bill in equity to settle conflicting claims to royalties collected and accruing under an oil and gas lease of lands allotted to a full-blood Creek Indian as a homestead. The allottee died intestate in November, 1908, leaving a husband and two minor children as her only heirs. One of the children was born before and the other after March 4, 1906. Under the applicable law of descent each heir took an undivided one-third interest in the lands, subject to the estate specially given to the child born after March 4, 1906, by § 9 of the Act of May 27, 1908, c. 199, 35 Stat. 312. The lease was given in 1912 by the husband and children—the latter acting through their repective guardians—in accordance with the rules and regulations prescribed by the Secretary of the Interior, and was approved by that officer.[1] The royalties have been and are being regularly paid to an officer of the Indian Bureau under a provision in the lease, and he receives and holds them in trust for the lessors according to their respective interests. The District Court held that each heir was entitled to one-third of the royalties and directed that they be distributed on that basis. 218 Fed. Rep. 391. In the Circuit Court of Appeals that decree was affirmed, one judge dissenting. 243 Fed. Rep. 42.

It is insisted here, as it was in the courts below, that under § 9 of the Act of May 27, 1908, the child born after March 4, 1906, is entitled to all the royalties accruing during her life, but not beyond April 26, 1931, or, if not to the royalties, to the income or interest therefrom during that period.

The lands were allotted under the Acts of March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32

[1] It was approved also by a local court.

Stat. 500, both of which provided that the homestead of each allottee should be inalienable for twenty-one years and on his death should remain for the use and support of his children, if any, born after the date which would entitle them to be enrolled and receive allotments of their own. By the Act of April 26, 1906, c. 1876, 34 Stat. 137, that date was changed to March 4, 1906, and as to certain allotments the restrictions on alienation were extended until April 26, 1931. With these matters in mind the provisions in the Act of May 27, 1908, relied on here, will be more readily understood.

By its first section that act relieves certain allotments from all restrictions, and then declares: "All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore." By its second section it provides: "That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." By its fifth section it declares that "any attempted alienation" of lands while

they are restricted and "also any lease of such restricted land made in violation of law . . . shall be absolutely null and void." And its ninth section contains the following:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions."

The allottee, as has been said, was an enrolled full-blood Creek Indian and died several months after the Act of May 27, 1908. The restrictions on the alienation of her homestead had not been removed, and among her heirs was a child—a daughter named Julia—born after March 4, 1906. In these circumstances a reading of section nine makes it very plain that the restrictions did not terminate with the allottee's death but remained in force, and also that the homestead was set apart for the

"use and support" of Julia during her life, but not beyond April 26, 1931. We need not stop to consider whether, strictly speaking, the right thus specially given to Julia was an estate for life or for years, for it evidently was not the purpose to make any nice distinctions along that line. Nor need we consider what effect a removal of the restrictions "in the manner provided in section one" after the death of the allottee would have had on the relative rights of Julia and the other heirs, for no such removal was attempted or intended by the Secretary of the Interior.

The oil and gas lease was to run for ten years and as much longer as oil or gas was found in paying quantity. It was given and approved under the provision in section two dealing specially with the leasing of restricted lands and homesteads. All the heirs joined in the lease and it was designed to be for the benefit of all. Nothing in it or in the provision under which it was given suggests that the rights of the heirs, as among themselves, were to be altered or affected. The oil and gas were to be extracted and taken by the lessee, and for this royalties in money were to be paid. These minerals were part of the homestead and the lease was to operate as a sale of them as and when they were extracted. In that sense the heirs were exchanging a part of the homestead for the money paid as royalties, but no heir was surrendering any right to the others. Thus the rights of all in the royalties were the same as in the homestead. Nothing in the Act of May 27, 1908, makes to the contrary. Under the provision in section nine specially providing for issue born after March 4, 1906, Julia was entitled for her support to the exclusive use of the entire homestead while she lived, but not beyond April 26, 1931, and those who took the fee took it subject to that right. The rights of all in the royalties must, as we think, be measured by that standard. In this view Julia is entitled to the use of the royalties, that is to say, the interest or income which may be ob-

tained by properly investing them, during the same period, leaving the principal, like the homestead, to go to the heirs in general on the termination of her special right.

Our conclusion on this point is in accord with the general trend of decisions in the oil and gas mining regions in similar situations. *Blakley* v. *Marshall*, 174 Pa. St. 425, 429; *Wilson* v. *Youst*, 43 W. Va. 826; *Eakin* v. *Hawkins*, 52 W. Va. 124; *Stewart* v. *Tennant*, 52 W. Va. 559; *Barnes* v. *Keys*, 36 Oklahoma, 6.

Decrees below reversed.